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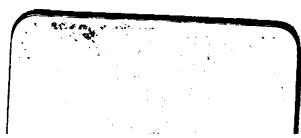
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THE
LAW OF PROPERTY

AS ARISING FROM

THE RELATION

OF

HUSBAND AND WIFE.

BY

SYDNEY SMITH BELL, Esq.

OF LINCOLN'S-INN, BARRISTER-AT-LAW.

PHILADELPHIA:
T. & J. W. JOHNSON,
LAW-BOOKSELLERS, PUBLISHERS AND IMPORTERS,
197 CHESTNUT STREET.

1850.

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P R E F A C E.

THIS work had its origin in an idea I at one time entertained, of offering to the proprietors of Roper's Work on Husband and Wife a new edition, with notes bringing down the law to the present time. But, on closer examination, I discovered that Roper's work is inferior, both in language and arrangement, to his Treatise upon Legacies; and that Jacob, in his edition of it, published so long back as the year 1826, has allowed the original text to remain untouched, by keeping his own contributions distinct, (either inclosed within brackets, or put in the shape of foot-notes), and has, therefore, left the reader to adjust for himself any difference or inconsistency between the author and the editor.

It seemed to me, therefore, that, if I were to do what would be really useful, I must enlarge my effort to the execution of an original work, giving a uniform account of the law down to the present time, by reconciling the matter of Roper's text with Jacob's additions where they differ, and incorporating the whole with the new law which has been made by statute and decision since Jacob's time. To keep the three distinct, as I had originally contemplated, would have produced a most unsatisfactory book, leaving the reader frequently in uncertainty as to what the law now really is.

But, since Roper and Jacob were both men of acknowledged learning and eminence, it will be satisfactory to the reader to know that I have, with very little exception, made their labours the groundwork of what is to be found in this volume.

As two other works have lately appeared upon this subject, I owe some

apology to the Profession for "putting them to their election" between those and a third. I began this book a considerable time ago; but an engagement to assist in preparing for Government a variety of model bills, which were subsequently passed into those acts known as the different "Clauses Acts," obliged me to suspend my labours entirely; and, when I resumed them, the calls of practice, and the discharge of my official duties in the House of Lords, retarded my progress so much, that, though, I believe, the first to occupy the field, I found others had come upon it; but, inasmuch as neither of the works to which I have alluded seemed to me entirely to supply the place which this was intended to fill, I did not think it necessary to withhold it from publication.

21, OLD-SQUARE, LINCOLN'S-INN,
May 8, 1849.

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PART I.

RIGHTS AND LIABILITIES ARISING, BY LAW, FROM THE RELATION OF MARRIAGE.

BOOK I.

EFFECT OF MARRIAGE ON THE PRIOR ACTS OF HUSBAND AND WIFE.

CHAPTER I.

EFFECT OF MARRIAGE ON THE PRIOR ACTS OF THE WIFE WITH THIRD PARTIES.

§ 1.—*Completed Dispositions of the Wife's Property.*

MARRIAGE, as will be seen more at large hereafter, operates as an assignment by the woman to the man of all her personal property, and the creation in him of a freehold estate in all her real property, unless in so far as these effects may have been modified by the previous agreement of the parties to the contract of marriage, or have been defeated by the terms of the gift, if any, through which the estate, whether real or personal, had become vested in the woman *dum sola*.

It is in the power of persons giving to a woman property, whether real or personal, so to limit the enjoyment as that an after-taken husband shall not have any interest in it, *and his rights will be regulated accordingly. In the absence of any such restriction, the woman has, until [*2] the actual solemnization of marriage, the absolute dominion of her property,

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to dispose of or settle it as she pleases; but with this qualification, that, so far as such disposition or settlement will affect the estate which, as already mentioned, marriage *de facto* gives the husband, it must be made with the knowledge and assent of the man she is about to marry, if, at the time of making it, she has either entertained proposals or entered upon a treaty for marriage with him. The contemplation of such a connexion as marriage implies the absence of any thing like distrust or suspicion. That vigilance, therefore, which ought to be exhibited in the ordinary transactions of life, cannot, in this matter, be exerted *à priori* to secure the operation of the assignment of marriage over all such parts of the wife's estate as by law it ought properly to extend to. The law, apparently recognising the propriety of this exuberant confidence in a man towards the woman with whom he is about to inter-marry, has not limited the commencement of the assignment of marriage to the period of the actual celebration of the ceremony, but draws it back by relation to the period at which the woman first entertained proposals or entered upon a treaty for marriage with the man to whom she is subsequently united. From that time forth a question arises as to the motive or intention of any disposition or settlement of her property made by the woman, and its effect upon the legal rights of the husband.

The cases in which questions of this nature have arisen have been under very differing circumstances, and the dicta of the judges in them are not perhaps entirely reconcilable. In some of the cases there seems to have been an [* 3] erroneous use of the term *fraud* in its popular sense, (a) as *if it were necessary for the husband to establish moral fraud in the disposition before marriage by the wife, in order to entitle him to relief. If moral fraud—if an attempt by the wife to cheat the husband is established by him, of course he will be entitled to be relieved against it; but the cases seem equally to establish, that, where the effect of the wife's disposition is to operate no more than a *legal* fraud upon the marital right, by curtailing those rights in her property which the law *de facto* gives to the husband, without the existence of any legal or moral obligation upon the woman to justify the act done by her, the husband will be entitled to be relieved, although there should be an utter absence of moral fraud on the part of the woman.

Upon a careful examination of the cases they will be found to establish, that, so long as a woman has not entertained proposals of marriage from the particular man with whom she afterwards intermarries, or entered upon such an intercourse with him as has marriage in contemplation, she continues absolute mistress of her property, and may dispose of it to whom she pleases, although by the disposition she may have in view marriage in general, but not with any man in particular. (b) A dictum of Lord King, in an old case, *Poulson v. Wellington*, (c) that a settlement made upon the first marriage of a woman would have been void and fraudulent as against her second husband, if he "had no notice" of it, is no doubt opposed to the doctrine which has been laid down. But unless by the expression "if he had no notice of it," was meant "if it was *concealed* from him," that dictum cannot be reconciled

(a) *Strathmore v. Bowes*, 1 Ves. jun. 22.

(b) *Blithe's case*, 2 Freem. 91; *King v. Cotton*, 2 P. Wms. 674; *England v. Downs*, 2 Beav. 522.

(c) 2 P. Wms. 533.

with the subsequent decision of the same judge in *King v. Cotton*, and of *Churchill, M. R.*, in *Blithe's case*. In both of these cases the disposition of the *wife was supported, because, at the time it was made, the after-taken husband was not thought of, so that notice or no notice was [*4] out of the question. An observation of Lord Brougham, in *St. George v. Wake*,(d) upon *Edmonds v. Dennington*, a case referred to in *Carleton v. Dorset*,(e) that it "proved nothing, for it was only that a second husband is not bound by a settlement made on a former marriage, of which settlement he had no notice, and which gave the wife power to act as a feme sole, notwithstanding the marriage," the same facts as existed in *Poulson v. Wellington*, seems to point at these facts, as accounting for the difference between the judgment in *Edmonds v. Dennington* and *Poulson v. Wellington*, and the other cases.

So soon, however, as a woman entertains proposals of marriage from the man with whom she afterwards intermarries, or enters upon such intercourse with him as has marriage between them in contemplation, her right, hitherto absolute, becomes thenceforth so far qualified, that every disposition of her property is open to the imputation by the husband of its having been made in contemplation of the right which the marriage would confer upon him, and with a view to defraud it, and may be challenged by him upon that ground. The decision of Lord Eldon in *De Manneville v. Crompton*(f) is no doubt opposed to this doctrine; but the case was very special in regard to the nature of the property which the wife had disposed of. Although his Lordship professed to disregard these specialties, it is impossible not to see that by the very statement of them they had some weight upon his mind. At all events, the general doctrine laid down in that case is not supported by any other, and would hardly be acknowledged in the present day.(g) It was there said, the "true question is, whether there is sufficient evidence of a representation and assurance (for it *must amount to that) that the personal estate as it stood at the commencement, whatever its [*5] amount, should no way be diminished if the marriage took place." It would be within the principle of this dictum to negative the husband's right to relief, where he was ignorant before marriage of the existence of the property disposed of, which certainly is not law.(h) And the modification of the dictum which Wigram, V. C., suggests, in *Taylor v. Pugh*, that it is for the Court to determine whether, "having regard to the condition in life of the parties and the other circumstances of the case," the transaction complained of is fraudulent or not, seems hardly less objectionable, as it would leave the rights of husbands in this respect at the arbitrary disposal of every successive judge, according to what he might consider reasonable or unreasonable in the circumstances of each case. The more safe as well as correct doctrine seems to be that laid down in *Goddard v. Snow*,(i) by Lord Gifford, M. R., that if, at the time of the execution of a settlement, marriage was in the contemplation of the parties, and the woman executed the settlement in that contemplation, and with concealment from the husband, it will not stand against his marital rights. Whether the first and the last of these

(d) 4 Myl. & Kee. 621.

(e) 2 Vern. 17.

(g) *Taylor v. Pugh*, 1 Hare, 613.

(h) *Goddard v. Snow*, 1 Russ. 485.

(f) 1 Ves. & Bea. 355.

(i) 1 Russ. 490.

circumstances being proved by the husband it would be necessary, as said by the same judge, for the husband likewise to prove the second circumstance, viz., the execution in contemplation of marriage, is doubtful; the presumption of this in his favour would rather seem to follow from the proof of the other two circumstances.

If, however, the woman, at the time at which she made the disposition complained of by her after-taken husband, lay under any obligation, legal or moral, to make it, the imputation of intention to defraud the marital right will be taken off. In *Blanchet v. Foster*,^(k) Lord Hardwicke said, [*6] * debt contracted for valuable consideration, though concealed from the husband, was no fraud upon the marriage; and he refused the husband relief against a bond which had been granted by the wife, on the eve of marriage, to her aunt for valuable consideration. In *Hunt v. Mathews*,^(l) a widow had executed a deed, assigning the greater part of her estate to trustees, as a provision for her children by her deceased husband; her after-taken husband got the deed into his possession and suppressed it; but the Master of the Rolls decreed him to pay the money, observing, that a widow might with a good conscience, before she put herself under the power of a second husband, provide for the children she had by the first. In *King v. Cotton*,^(m) Lord King said, it was a very reasonable thing for a widow, while it was in her power, to make a provision for her children by her former husband; and the same sentiment was echoed by Lord Langdale, M. R., in *England v. Downs*.⁽ⁿ⁾ In *St. George v. Wake*,^(o) Lord Brougham, C., even refused to set aside a conveyance by one sister to another of a reversionary interest, made after treaty of marriage, and on the suggestion of disinterested parties, that the conveyance might promote peace between the sisters by soothing the disappointed feelings of the grantee, in regard to the estate she took under the will of an aunt, from whom the reversionary right came. But that case was attended with this specialty, that it was neither alleged nor proved by the husband that he was ignorant of the transaction at the time, nor was it quite certain that a treaty for the marriage was then going on; and the lapse of a month between the date of the conveyance and of the marriage, during which period the husband was in constant intercourse with the wife and her family, who were aware of the transaction, made it more than likely, as Lord Brougham observed, [*7] that he was aware of it likewise. *Whether, if the same case were to occur without these specialties, the same judgment would be given, may be doubted; for, although the circumstances perhaps precluded the imputation of fraud, in the *popular* sense of the term, the gift to the sister was a *legal* fraud upon the rights of the husband, for the wife was not under a legal or moral obligation to make the gift, in a sense to justify it upon the authority of any case in the books.

Although the existence of a moral obligation upon the woman, as to provide for her children, will take off the imputation of intended fraud upon the rights of an after-taken husband, this will not be the case if the one moral obligation has been discharged at the expense of another—openness and fair dealing with the husband. Accordingly, where a widow, during

(k) 2 Ves. sen. 264.

(l) 1 Vern. 408.

(n) 2 Beav. 528.

(m) 2 P. Wms. 674.

(o) 1 Myl. & Kee. 610.

the treaty for a second marriage, intimated her intention to settle her fortune for the benefit of her daughter by the first marriage, in consequence of which the treaty was broken off, and afterwards married the same man, concealing from him the fact that she had made the settlement, and allowing him to entertain hopes of enjoying her fortune, the settlement was set aside. (p) In *England v. Downs*, (q) already referred to, Lord Langdale, M. R., said: "In the execution of this settlement, so far as it made provision for her children, she was performing a moral duty. It was clearly her duty, before she placed herself and her property in the power of her second husband, to secure a provision for her children by her first husband, from whom her property was derived; but, in performing her duty towards her children, she had no right to act fraudulently towards her second husband. A woman in such circumstances can only reconcile all her moral duties by making a proper settlement on herself and her children, with the knowledge of her intended husband."

*If the disposition of her estate has been made covertly by the wife, as a means of protecting her against the husband's fraudulent [*8] and vicious conduct towards herself, the Court will not disturb the disposition, as in *Taylor v. Pugh*, (r) where the disposition was made after the husband had induced the woman to come to his house and cohabit with him, before they had been married. Sir James Wigram concluded his judgment with the observation, that he was very far within authority in saying, that a woman, in the view of the Court, committed no fraud on her husband, if, in such circumstances, she took the only means he had left her of protecting herself, that of making a settlement without his knowledge.

As it is the concealment from the husband practised by the wife, which is the foundation of the husband's equity to relief, mere ignorance by him prior to the marriage of the existence of the property disposed of by the wife, will not affect his right to relief against the disposition, as in *Goddard v. Snow*, (s) where the ignorance not only existed prior to the marriage, but continued until after its dissolution by the death of the wife.

If the husband assented to the disposition by the wife, either expressly or otherwise, he will not be relieved against it, for that destroys every imputation of fraud: (t) and it will not make any difference, that, at the time, the husband was an infant; for, though his consent would not conclude him from any right to which he might be entitled, yet it equally destroys the imputation of fraud, as if he had been of age. (u)

*§ 2.—*Inchoate Obligations.*

[*9]

Having considered the validity of completed dispositions by women of their property made before marriage, and their effect upon the rights which marriage *de facto* gives the husband to the property of the wife, let us next

(p) *Howard v. Hooker*, 2 Rep. in Ch. 42.

(r) 1 Hare, 608.

(s) *St. George v. Wake*, 1 Myl. & Kee. 626.

(u) *Slocombe v. Glubb*, 2 Bro. C. C. 545.

(q) 2 Beav. 528.

(s) 1 Russ. 485.

view the validity as against her husband of such of her other acts and obligations as were merely initiate at the time of the marriage.

The effect of marriage upon the *status* of a woman is, in many respects, to suspend her existence in law throughout the duration of the coverture; and one of these respects is, that she is rendered incapable of completing such of her obligations as would go to charge the husband, and were initiate at the time of the marriage, and for their perfection required something to be done after that time. Thus, while the Court intimated its willingness to give leave, after marriage, to the husband to enter up judgment upon a warrant of attorney to confess, which had been given to the wife *dum sola*,^(v) it was said, that it would refuse this leave to third parties to enter up judgment upon a warrant to confess which had been given *by* a wife *dum sola*,^(w) because that would go to charge the husband. Yet it must be admitted, that, so far as any act of the wife was concerned, nothing remained to be done by her after marriage; and on the supposition that the debt for which the warrant was given was owing bona fide, there seems no reason why the husband should not be liable for it, as for a bond granted before marriage.

According to Perkins, sect. 11, if a woman were, prior to marriage, to deliver a deed as an escrow, it would be binding, although the condition should not be performed, nor the deed given to the grantee until after the commencement *of the coverture; for the completion of the deed [*10] was effected by the delivery as an escrow, to which time the giving of it to the grantee draws back by relation.

Even prior to the Wills Act^(x) marriage revoked, for the period of the coverture at least, all wills made by the wife prior to the marriage;^(y) but a question was made, whether, if the wife survived the husband, her will made before marriage would not revive after the husband's death, because the will does not take effect till then, and at that time she is *discoverte*.^(z) Any question of this kind cannot henceforth arise, as to wills made after the 1st of January, 1838, for, by the 18th section of the Wills Act, it is declared, that every will made by a woman shall be revoked by her marriage, unless it has been made in exercise of a power of appointment, under which the property appointed would not, in default of the exercise, pass to her heir or representative or next of kin under the Statute of Distributions. Prior, also, to the Wills Act, a surrender of copyholds by a woman, *dum sola*, to the uses of her will was void, if the will declaring the uses were not executed till after marriage. As the lord cannot be a trustee, the fee does not, by the surrender, vest in him, but remains in the woman, notwithstanding the surrender, until she complete the surrender, by declaring the uses. But this she could not do after the coverture had intervened, as a married woman, by 34 & 35 Hen. 8, c. 5, cannot make a will of land; the fee, therefore, was not taken out of her, and both surrender and will became simply inoperative.^(a) Multo fortiori, would such a surrender be now void,

(v) *Marder v. Lee*, Burr. 1469; *Anon.*, Salk. 117, Show. 89.

(w) *Anon.*, Salk. 117.

(x) 7 Will. 4 & 1 Vict. c. 26.

(y) *Forse v. Hembling*, 4 Co. Rep. 61; *Hodsdon v. Lloyd*, 2 Bro. C. C. 543.

(z) *Plowd. Com.* 343; *Lewis's case*, 4 Bur. Eccl. Law, 51.

(a) *George v. Dew*, Amb. 627.

since the statute has declared generally that marriage is a revocation of all prior wills.

In *Doe v. Staples*,^(b) Ashhurst, J., doubted whether it could be agreed before marriage, that marriage should not *revoke the will of the wife, because this would be a stipulation in direct opposition to a [*11] rule of law.^(c) But in *Hoddesden v. Lloyd*,^(d) a branch of the same case, Lord Loughborough said, that, as to chattels, both real and personal, the husband, by contract anterior to the marriage, resting only in agreement, could authorise the wife to make a will, although he could not do so as to real estate, so as to bind the heir. It would rather appear, however, that of these two opinions, that of Ashhurst, J., is the sounder; and that an agreement of the kind referred to could not defeat the general rule of law, and still less the positive enactment of the Statute of Wills, unless, perhaps, the husband survived, and should attempt to take in the face of his own agreement.

If a woman dum sola enter into a submission to arbitration, and marry before the arbitrator makes his award, the submission will be revoked by the marriage, and the arbitrator be incapacitated to make any award.^(e) But if, in the deed of submission, there was a covenant to abide by the award, the other party to the submission will be entitled to recover against the husband and wife in an action for breach of this covenant, by the marriage preventing the arbitrator from making any award to be abided by.^(f)

*CHAPTER II.

[*12]

EFFECT OF MARRIAGE ON PRIOR ACTS OF HUSBAND AND WIFE INTER SE.

BEFORE quitting the effect of marriage upon the acts of the wife either initiate or completed prior to the marriage, it will be convenient to consider its effect upon obligations granted at that period from the woman to the man, and vice versâ.

With regard to such obligations not having reference to marriage, but arising out of the ordinary transactions of life, the effect of the subsequent marriage is different in law and in equity. In law the marriage extinguishes the obligation.^(a) Thus marriage will operate as a release in law of a bond granted previously by the wife to the husband. If the bond arose out of the ordinary transactions of life, and do not regard real estate, the assignment of marriage by making the husband both debtor and creditor, extinguishes the liability; and even if it were made with a view to, or as a con-

(b) 2 T. R. 697.

(c) See also Gould's, J., opinion in *Gage v. Acton*, 1 Raym. 516, as to invalidity of agreement, that marriage should not operate as a release of a debt owing by the husband to the wife.

(d) 2 Bro. C. C. 544.

(e) *White v. Gifford*, 1 Roll. Abr. 331, pl. 4; *Charnley v. Winstanley*, 5 East, 266.

(f) *Charnley v. Winstanley*, 5 East, 270.

(a) Co. Litt. 264, b.

sideration of marriage, the power to recover upon it is gone so long as the coverture lasts, for married persons are one in law, so that no action can be maintained by the one against the other. And it would seem to follow from the opinion both of the majority and the minority of the judges, in *Cage v. Acton*,^(b) that marriage will operate as a release of a bond arising out of the ordinary transactions of life, although the period for performance should in the event turn out to be posterior to the termination of the coverture; [*13] for, if the performance *might be made during the coverture, it is debitum in præsentī, although solvendum in futuro.

In equity which looks at the substance rather than the form, and has no rule which prevents married persons from suing each other, the matter is otherwise. If the obligation, granted by the wife to the husband previously to marriage, have been made for good consideration, and be such as from its nature the husband cannot have the benefit of without suit, that remedy will be open to him, as in *Cannel v. Buckle*,^(c) where the Court decreed performance by a married woman of a bond, given by her previously to marriage, whereby she bound herself, in consideration of the expected marriage, to convey her real estate to her intended husband.

Neither at law nor in equity will marriage operate as a release of debt or obligation, which was owing by the husband to the wife prior to marriage, not in her own right, but in her representative character as executrix or administratrix of another; for that would be to make the marriage work a devastavit to the injury of the rights of third parties having claims against the estate of the testator or intestate.^(d)

Where the obligation is by its terms to be performed during the coverture, the observations which have been made in regard to obligations by the woman to the man will apply; but if a man, in contemplation of marriage with a woman, and as a settlement upon her, give her a bond or other obligation for payment of a sum of money or other performance to be made after his death, it will be good to the wife, both at law and in equity; for the right it gives, not being to take effect until a period which must [*14] arrive after the expiration of the coverture, is no way *inconsistent with the law in regard to the effect of marriage during coverture, and is only suspended during the coverture, not extinguished by it;^(e) although the promise continues throughout the coverture, the right of action could not accrue until after the coverture; and, to make the promise be released by the coverture, would be to render it useless from the beginning, contrary to the express agreement of the parties, and to work a wrong.^(f)

(b) 1 Ld. Raym. 516.

(c) 2 P. Wms. 243.

(d) *Dorchester v. Webb*, Cro. Car. 372; *Cotton v. Cotton*, 2 Vern. 290.

(e) *Cage v. Acton*, 1 Raym. 517; *Milbourne v. Ewart*, 5 T. R. 381.

(f) *Smith v. Stafford*, Hob. 216; *Clark v. Thompson*, Cro. Jac. 571.

BOOK II.

VALIDITY OF ACTS DONE BY WIFE DURING COVERTURE.

*CHAPTER I.

[*15]

GENERAL CONTRACTS.

HAVING spoken of the effect of marriage upon obligations entered into by married persons prior to its celebration, let us now consider its effects in respect of matters occurring within the period of the coverture. And *first*, as to the disabilities which the law imposes upon married women to do certain acts.

The law looks to the husband, as the head of the family, for the maintenance and education of its members. This is a duty which he could not perform, if any other had an equal control with him over the property of the family. It is of necessity, therefore, that the law has incapacitated the wife during the coverture from doing any act without the husband's consent, which could have the effect of charging either his own property or that which he holds in her right. A married woman cannot, therefore, enter of her own authority into any contract which shall bind herself or her husband to his prejudice, and contrary to his assent. Her contract, however, is not void *ab initio*, to this extent at least, that the husband may if he choose take to it and affirm it. Thus, if a married woman make a purchase without her husband's consent, he may disagree thereto and *divest the estate; but if he neither agree nor disagree the purchase is good. (a) [*16] Accordingly, in *Granby v. Allen*, (b) a husband recovered, by action of trover, money, which had been paid by his wife for the purchase of lands without his assent: but it was said, that, if he had once assented, his right to the action would have been lost, as the property in the money would thereby have been altered. The contract of the wife therefore is good, so far as regards the husband, until he express his dissent to it. *Smith v. Plomer* (c) is hardly an authority to the contrary, for in that case the wife had been living apart from the husband, with the knowledge of the party who contracted with her.

A married woman cannot of her own authority receive or discharge money owing to herself or her husband. (d) Thus payment upon her receipt of a legacy bequeathed to her, will be void, as against her husband, if she have not paid over the money to him; and this, although she may have been living apart from the husband at the time the will was made, so as to

(a) Co. Litt. 3, a.; *Manby v. Scott*, 1 Sid. 109.

(b) 1 Raym. 224.

(d) *Brown v. Benson*, 3 East, 331.

(c) 15 East, 607.

suggest the argument that the legacy was intended for her personal use.(e) So, if she, of her own authority, give a bond or warrant of attorney, it will be void, and any money she may have paid under it the husband can recover by action;(f) and her indorsation or assignment of a bill of exchange or promissory note will be a nullity.(g)

But if the husband authorise the wife to receive and pay money, or allow her to do so frequently, what she does in these respects will be presumed to be done by his authority, and will bind him accordingly, for there is nothing [*17] in their *relative situations to prevent a wife from acting as her husband's agent or attorney;(h) or if the husband allow the wife to carry on a trade, he will be liable for her obligations made in the course of it.(i) What will amount to authority to this effect will depend upon the circumstances of each case. In *Smallpiece v. Dawes*,(k) the fact of the wife, after the husband's bankruptcy, carrying on the same business which he had previously conducted, and doing so under a firm in which the same name as the husband's appeared, coupled with the circumstance of the husband having once come to the place of business, was not held to give evidence of his authority to carry on the business.

Even where the husband has allowed the wife to carry on trade, this will not make him liable for the acts generally of the wife, done in the course of the trade, but only for those which are indispensably necessary for the carrying on of the trade itself. Thus, authority to carry on trade, will not infer authority to draw and accept bills in the course of the trade. In *Goldstone v. Tovey*,(l) a husband was held not to be liable for the amount of a bill drawn by his wife in the course of her trade as an innkeeper, which she carried on with the consent of her husband, there not being evidence of any authority given by the husband to the wife to draw or accept bills.

[*18]

*CHAPTER II.

TRADING BY WIFE UNDER CUSTOM OF LONDON.

ONE great exception to the disabilities of married women to contract exists in regard to wives of citizens of London, who, according to a custom of that city, may trade as if they were *femes soles*, and in the trade incur all the liabilities which an unmarried woman would be exposed to. This custom is, in *Lavie v. Phillips*,(a) stated to be, as translated from the "*Liber Albus*," that "where a *feme covert* of a husband useth any craft in the city on her sole account, whereof the husband meddleth nothing, such a woman shall be charged as a *feme sole* concerning every thing that toucheth

(e) *Palmer v. Trevor*, 1 Vern. 261.(f) *Roberts v. Pierson*, 2 Wils. 3.(g) 3 Wils. 5; *Barlow v. Bishop*, 1 East, 434.(h) *Bowyer v. Peak*, *Freem. C. C.* 215; *Seaborne v. Blackstone*, *Id.* 178; *Cotes v. Davis*, 1 Camp. 485.(i) *Longfort v. Tiler*, *Salk.* 113.

(j) 3 Jur. 1175.

(k) 7 C. & P. 40.

(e) 3 Burr. 1776.

her craft; and if the husband and wife shall be impleaded, in such case the wife shall plead as a feme sole, and if she is condemned, she shall be committed to prison till she has made satisfaction, and the husband and his goods shall not in such case be charged nor impleaded." In *Langham v. Bewett*,^(b) it is said, that the custom is where the feme trades by herself in one trade, and the husband trades in another.

If the husband have intermeddled with the trade carried on by the wife, the case will not be within the custom.^(c) But if the case be within the custom, it is not possible for the husband, in questions between him and the creditors of the wife, to intermeddle retrospectively with the trading, so as take from the creditors of the wife that which belongs to them; for this would be to destroy the custom by *rendering it nugatory and ineffectual.^(d) He may, however, take the stock and capital after the [* 19] wife's creditors are satisfied, and put an end to the trading for the time to come.^(e)

As the wife and her goods in the trade are liable in execution for debts incurred by her in the trade, and as the statutes of bankruptcy are wide enough to embrace her case, she is liable to be made a bankrupt as a feme sole trader.^(f) And, in case her husband should also be made a bankrupt, the assignees under her bankruptcy will be preferable upon her goods to the assignees under her husband's bankruptcy.

CHAPTER III.

DOMESTIC CONTRACTS FOR USE OF FAMILY.

WITH regard to domestic contracts—to contracts made by the wife for the supply of articles for the use of the family, though undoubtedly the wife has no greater power to enter into these than into contracts generally, yet the evidence of authority from the husband is not required to be so precise with respect to them. The wife, while she lives and cohabits with her husband, is under him the head of his family; and the law, from the circumstance of cohabitation, raises a presumption that such contracts as she makes for the use of the family are made with the authority of the husband.^(a) It is open, however, to the husband to rebut this presumption, by *showing that he expressly, with the previous knowledge of the creditor, refused to give his authority;^(b) or he may show, by the extravagance of the furnishings, with reference to his condition in life, and by the manner in which the creditor dealt with the wife, that the creditor considered himself to have been dealing with her alone, and did not trust to any implied authority from the husband to the wife to bind him.^(c) [* 20]

(b) Cro. Car. 69.

(c) *Langham v. Bewett*, ubi supra.

(e) d. 1785

(d) *Lavie v. Phillips*, 3 Burr. 1782.

(f) Id. 1782.

(a) *Etherington v. Parrott*, Raym. 1006; *Bennett v. Norton*, 8 C. & P. 506; *Freestone v. Butcher*, 9 C. & P. 643; *Clifford v. Lutton*, 3 C. & P. 15.

(b) *Etherington v. Parrott*, Raym. 1006; *Bailey v. Calcot*, 4 Jur. 609.

(c) *Metcalf v. Shaw*, 3 Camp. 22; *Bentley v. Griffin*, 5 Taunt. 356; *Montague v. Bene-*

If the articles supplied to the family upon the order of the wife are such as are manifestly extravagant, authority of the husband will not only not be presumed, in order to support the creditor's right to recover; but, as it is the license of the husband to the wife, express or to be presumed from the circumstances, and not the contract of the wife, which binds the husband, *(d)* it will be necessary for the creditor to shew either an express authority from the husband to the wife, or an authority to be presumed from other circumstances than the mere relation of the parties: *(e)* an express authority to purchase the particular articles, or an authority to be presumed from previous purchases of a similar nature having been made with the knowledge of the husband, *(f)* or from the particular purchase having come to his knowledge, and his having allowed his wife to retain and use the articles. *(g)* And, in the absence of evidence of this kind, it will not be necessary for the husband to show that he had withdrawn his implied authority, or that he had given the creditor notice not to supply the particular goods. *(h)*

[*21] *What articles are not to be considered extravagant, so as to bring the contract of the wife for their supply within her presumed agency, as head of the family, must depend upon the actual rank and circumstances of the life of the husband, or upon the apparent rank and circumstances which he has either himself held out, or allowed the wife to hold out to the world; *(i)* for these considerations are an important element in estimating whether the article furnished comes within the range of purchases which the wife can be presumed to have made with the concurrence of the husband, or whether the purchase has, in the particular instance, been made by her in excess of her authority. *(k)*

CHAPTER IV.

CONTRACTS OF WIFE FOR SUPPLY OF NECESSARIES TO HER OWN USE.

If the husband, while the wife is yet living in his house, expressly withdraw from her the management of the family, and the power of making any contracts to bind him, or if she be living apart from him, under circumstances which justify her in so doing, although she can no longer make any contract with the presumed authority of the husband, yet she has an implied authority from the husband to supply herself with necessities; for in both cases the husband continues bound to provide her with food and clothing [*22] suitable to his own station in life; and if he fail in that duty, it is *of necessity that she should have power to bind him in this res-

dict, 5 B. & C. 851; *Freestone v. Butcher*, 9 C. & P. 648; *Lane v. Ironmonger*, 13 M. & W. 368.

(d) *Manby v. Scott*, 1 Keb. 429.

(e) *Atkins v. Curwood*, 7 C. & P. 756.

(f) *Morton v. Withers*, Skin. 349; *Spreadbury v. Chapman*, 8 C. & P. 371; *Denys v. Sargent*, 6 C. & P. 419.

(g) *Waithman v. Wakefield*, 1 Camp. 120.

(h) *Atkyns v. Curwood*, 7 C. & P. 756; *Spreadbury v. Chapman*, 8 C. & P. 371.

(i) *Waitham v. Wakefield*, 1 Camp. 120; *Atkins v. Curwood*, 7 C. & P. 756.

(k) *Freestone v. Butcher*, 9 C. & P. 647; *Lane v. Ironmonger*, 13 M. & W. 368.

pect.(a) The law has transferred to the husband all the property of the wife available for these purposes; it by fiction, therefore, implies against him, that purchases of necessaries by the wife have been made with his authority. This implication will entitle the party supplying the necessaries to recover their value from the husband in the face of the most positive evidence, not only of a want of authority from him, but of a refusal to provide the necessaries or give the authority.(b) The only way in which the husband can elude this liability is by showing, either that he has performed his duty by supplying the necessaries, or that his liability has ceased through the misconduct of the wife, as by her adultery or elopement from his protection.(c) But, in order to maintain an action for the necessaries, the *onus* lies upon the party supplying them to show that the wife was in a condition which rendered the supply necessary: this was held even where the husband had already adjusted accounts embracing the supplies, and had promised the party to pay the balance upon them.(d)

The husband will not be discharged from his liability for the price of necessaries supplied to the wife, by shewing that he has covenanted by deed to pay her an allowance for her separate maintenance, unless he can further show that he had actually paid the allowance for the period during which the necessaries were furnished;(e) neither will his liability be discharged by a decree of the Ecclesiastical Court for alimony to the wife, unless he can prove that the alimony *has been paid.(f) In *Rawlings v. Vandyke*,(g) Lord Eldon ruled, that, in defence to an action for necessaries supplied to a married woman, "it was incumbent on the husband to show that the tradesmen knew of the separate maintenance." But in *Turner v. Winter*,(h) Lord Mansfield disregarded the fact of the want of this evidence; and, in *Mizen v. Pick*,(i) the correctness of the reporter, in attributing to Lord Eldon the ruling in *Rawlings v. Vandyke*, was doubted; at all events, the ruling was denied to be good law.

If the wife is otherwise provided for than by the husband, as by a competent provision from her own father, or from other sources, the husband will not be liable for necessaries supplied to her.(k) But in *Thomson v. Henry*,(l) he was held to be liable, notwithstanding evidence that the wife enjoyed a pension, because the pension was revocable at pleasure, and therefore was not such a fund as a creditor supplying even necessaries could be supposed to give credit to.

What articles are to be considered necessaries, so as to support their purchase under an implied authority from the husband, depends also upon the husband's rank and circumstances in life; for the term "necessaries" is not confined to what is necessary for the bare existence of the wife, but for her existence in that condition which would be consistent with the husband's

(a) *Seaton v. Benedict*, 5 Bing. 31.

(b) *Harris v. Morris*, 4 Esp. 41; *Boulton v. Prentice*, Strang. 1214.

(c) *Lidlow v. Wilmot*, 2 Stark. 86; *Dixon v. Hurrell*, 8 C. & P. 717; *Ozard v. Durnford*, Selw. N. P. 294.

(d) *Bird v. Jones*, 3 M. & R. 121.

(e) *Nurse v. Craig*, 2 B. & P. N. R. 148; *Burrett v. Booty*, 8 Taunt. 353.

(f) *Hunt v. De Blacquiére*, 5 Bing. 556.

(g) 3 Esp. 252.

(h) Selw. N. P. 295.

(i) 3 M. & W. 481.

(k) *Clifford v. Laton*, Moo. & M. 101; *Lidlow v. Wilmot*, 2 Stark. 87.

(l) *Burr*. 2178.

condition in life, if the supply had come from himself.(m) The implied credit of the wife for necessaries includes every thing requisite for her personal safety and preservation; accordingly, medicines, medical attendance, *and other reasonable expenses attendant upon illness, will come within the term "necessaries."(n) In *Shepherd v. M'Koull*,(o) an attorney's bill of costs for exhibiting articles of the peace by the wife against the husband, and defending her against an indictment for keeping a bawdy-house, was held to come within the term.(p) But, as the wife may be protected by articles of the peace, the costs of prosecuting an indictment by the wife against the husband for an assault were held not to come within the term;(q) and so as to the expenses of preparing a deed of separation; neither being necessary for the wife's sustenance or protection.(r)

The policy of the law, however, is to enforce cohabitation between married persons, and therefore it will only give the wife implied authority for the purchase of necessaries, where, if she has ceased to cohabit with her husband, she has done so reasonably.(s) Thus, if the husband have turned her out of doors, that of itself will send along with her authority to provide what is necessary for herself;(t) so, likewise, if he force her by his conduct to leave his house,(u) as by threatening her with his fist and with restraint in a mad-house,(v) or by exhibition of indecent conduct.(w) Yet, in *Horwood v. Heffer*,(x) Lord Mansfield ruled that conduct insulting to the delicacy of the wife, by placing a mistress at the head of her table, would not support an action for necessaries supplied to the wife who had in consequence quitted the husband's house, and that *nothing short of actual [*25] terror and violence would justify the action; otherwise suits for alimony and divorce a mensâ et thoro would be superseded. If the separation have taken place by mutual assent, and the wife has no provision otherwise, the action will lie against the husband.(y)

If the wife have left the husband's house through his misconduct, his bare request that she should return will not determine his liability for her necessaries. If she return upon receiving such request, of course his liability will thenceforth be at an end; but, if she refuse to comply, it will continue until he obtain a decree of the Ecclesiastical Court for restitution of conjugal rights;(z) nay, if the wife have absented herself from her husband's house under circumstances leaving it doubtful whether she is justified in her continued absence, yet if he couple his request for her return home with conditions to which she is not bound to accede, as that she should give up part of the money settled upon her before marriage, his liability for her necessaries will continue.(a)

If the wife leave the husband's house voluntarily, and without any thing in his conduct obliging her to do so, she has neither a presumed nor an

(m) *Ewen v. Hutton*, 3 Esp. 253; *Waithman v. Wakefield*, 1 Camp. 120; *Hodgkinson v. Fletcher*, 4 Camp. 70; *Hindley v. Westmeath*, 6 B. & C. 200; *Harvey v. Norton*, 4 Jur. 42.

(n) *Harris v. Lee*, 1 P. Wms. 463.

(o) 3 Camp. 326.

(p) See also *Williams v. Fowler*, M'Cl. & Y. 269.

(q) *Grindell v. Goldsmid*, 5 Ad. & E. 757.

(r) *Ladd v. Lynn*, 2 M. & W. 267.

(s) *Mainwaring v. Leslie*, 2 C. & P. 507.

(t) *Hunt v. De Blaquiere*, 5 Bing. 557; *Rawlings v. Vandyke*, 3 Esp. 251.

(u) *Hodges v. Hodges*, 1 Esp. 441.

(v) *Hmnliston v. Smith*, 3 C. & P. 22.

(w) *Lidlow v. Wilmot*, 2 Stark. 87.

(x) 3 Taunt. 421.

(y) *Dixon v. Hurrell*, 8 C. & P. 717.

(z) *Emery v. Emery*, 1 Y. & J. 501.

(a) *Read v. Moore*, 5 C. & P. 200.

implied authority to make him liable for necessities supplied to her; for their cohabitation is the foundation of the presumed assent, and her necessities of the implied assent, and both are wanting in such a case.(b) But Roper (Vol. II., p. 114) thinks it requisite that the fact of the elopement should be notorious, before the husband can be freed from liability. If she offer, under such circumstances, to return to her husband's house, it would seem that he is bound to receive her; and should he *refuse, she would thereafter have an implied power from him to purchase neces- [*26] saries.(c)

If the elopement of the wife be accompanied with adultery, the husband will be relieved from all liability for any thing she may purchase, whether in respect of necessities or otherwise, and whether the party from whom she makes the purchase have notice of the elopement or not:(d) unless the husband forgive the adultery, and receive the wife back to his house, in which case his liability will revive for goods furnished after the period of her return.(e) Nay, if the wife have left the husband's house under circumstances which would justify her in so doing, or have been turned out of doors by the husband, and afterwards commit an act of adultery, this will relieve the husband of liability to provide her with necessities.(f) On the other hand, if the adultery have been committed in the husband's own house, and he allow her, nevertheless, to remain there, he himself continuing, or even going away, his presumed authority for what she may purchase for the use of herself and the family will continue until their separation and her misconduct become notorious, or known to the party making the furnishings.(g)

The result of the cases seems to establish, that where husband and wife are cohabiting together, the mere fact of the cohabitation is sufficient to justify the world in dealing with the wife, on the presumption that she has authority to purchase whatever may be necessary for the wants, comforts, or even elegancies of her husband's household; and that every one dealing with her is safe in trusting to this presumed authority, so long as it has not been repudiated *by the husband, or is not palpably abused, to the indulgence of extravagance or the acquisition of things not coming [*27] properly within the range of the objects for which the authority is presumed; and it will be for the husband to rebut the presumption by evidence negating the authority. But if the husband, while the wife is living with him, expressly withdraw from her the authority to bind him, which the cohabitation between them would otherwise give her, as has been seen, or if they have ceased to cohabit, by the wife living apart from the husband, then, as any presumption of authority is at an end, the onus is thrown upon the party dealing with the wife of inquiring under what circumstances the goods are ordered by her, and of showing that the husband has either refused or failed to provide her with necessities, and that she has not been supplied with them from other sources. And, if the creditor succeed in establishing these particulars, the law by fiction implies an authority from

(b) *Etherington v. Parrott*, Raym. 1006; *Manby v. Scott*, 1 Keb. 429.

(c) *Manby v. Scott*, 1 Keb. 429.

(d) *Morris v. Martin*, 4 Strang. 647; *Mainwaring v. Sand*, Id. 707.

(e) *Harris v. Morris*, 4 Esp. 41.

(f) *Govier v. Hancock*, 6 T. R. 603.

(g) *Norton v. Fazan*, 1 B. & P. 226.

the husband to the wife to make the purchases, which he cannot rebut by any evidence even of an express refusal of authority. In short, where cohabitation continues, a party dealing with the wife has no inquiry to make, and need only exercise his own prudence and discretion. On the other hand, when cohabitation has ceased, then the party must not only exercise his prudence and discretion, but must, previously to dealing, inquire into the situation and circumstances of the wife at his peril.

[*28]

*CHAPTER V.

ACTS OF MARRIED WOMAN AS EXECUTRIX.

THE attention of the reader may be conveniently drawn here to those obligations which may be incurred by a married woman, in respect of her acts as executrix or administratrix. If a woman, prior to marriage, assume either of these offices, or if after marriage, her husband clothe her with it with her consent, although, during the coverture, she will not be answerable, yet, if she survive her husband, she will, in both of the cases which have been suggested, be answerable at law to creditors for waste committed, whether by herself before marriage, or by her or her husband during the coverture; (a) because, where she was executrix prior to marriage, it was "her own folly" to take a husband, who would so misconduct himself, as to waste her testator's or intestate's goods; (b) and where the husband, after marriage, with her consent, clothes her with the character, it is her own act which puts it in his power to commit the waste, for which an action would lie against both him and her, and will survive against her surviving. (c)

Equity would undoubtedly relieve a legatee against the husband of an executrix for devastavit committed by him; but whether it will do so against the executrix herself surviving for devastavit committed by the husband, or by herself during the coverture, has not as yet been determined. Where the devastavit has been committed by herself before marriage, or by her husband under an administration imposed *by him upon her with [*29] her consent, the same reason and justice which give a creditor a legal remedy against her surviving, suggests that a legatee should have a like remedy in equity. The question arose for decision in *Adair v. Shaw*, (d) where a strong opinion was expressed by Lord Redesdale, that the wife was responsible in equity to legatees, as she undoubtedly was at law to creditors, for devastavit committed by her husband deceased; but no judgment was given upon the point.

If the husband have clothed the wife with the representative character against her consent, it would seem, that, upon his death, she may renounce

(a) *Horsley v. Daniel*, 2 Lev. 145; *Bellew v. Scott*, 1 Strang. 440, commented upon in *Adair v. Shaw*, 1 Sch. & Lef. 261; *Vaughan v. Thomson*, note to Dyer, 210 a.

(b) *Mounson v. Bourne*, Cro. Car. 517.

(c) *Ibid*.

(d) 1 Sch. & Lef. 261.

the office, and avoid the consequences of his act; but for this there is no positive authority. In *Roper* the law is so stated, but upon authorities which do not altogether support the statement.(e)

CHAPTER VI.

LIABILITIES OF WIFE IN RESPECT OF HER ACTS PRIOR TO AND DURING COVERTURE.

As all contracts of a married woman are void, those for necessities supplied to her being supported only as the contracts of her husband made by her under an implied authority from him, it follows as a necessary consequence that she cannot be sued alone in respect of them. The law incapacitates all married women, except the wife of the Sovereign, from suing or being sued alone without their *husbands, in respect of any contracts they may have entered into;(a) unless, indeed, in certain [*30] cases of absence of the husband from the realm, and of custom within the city of London, which will be noticed presently.

Smout v. Ilberry(b) is a good example of the extent to which this incapacity of the wife to be sued is carried: there the wife, in the absence of her husband, who had gone abroad upon business, ordered necessities for the use of herself and the family; the husband died before returning home, and the wife was found not to be liable for the necessities supplied upon her order for the period between her husband's death and the time at which the fact became known to her.

The Queen Consort is a special exception to the rule, that a married woman cannot sue or be sued, and the reason given for the exception is, that the King may not be troubled or disquieted for private or petty causes; she therefore may sue or be sued without the King.(c)

Although a contract be of that nature that the husband is not liable to be sued upon it, as where it has been made by the wife without his assent, yet the creditor cannot maintain action upon the contract against the wife herself, but is without a remedy.

Accordingly, a married woman cannot be sued even for necessities supplied to her, for which the husband is not liable, by reason of having given her a separate allowance for the purpose,(d) although the creditor may not have had notice of the allowance. In *Corbet v. Poelnitz*,(e) the Court, recognising the authority of a few cases decided shortly before,(f) sustained an action against a married woman, sued as a feme sole, who had an ample separate allowance *from her husband, upon the ground that her incapacity to contract or sue was founded upon her not having any [*31] property; but this ground was wanting where she had such allowance, and

(e) *Wentworth, Office of Executor*, c. 17, p. 206; *Smith v. Porter*, *Dyer*, 166 b.

(a) *Co. Litt.* 132, b.

(b) 10 M. & W. 1.

(c) *Ibid.*

(d) *Marshall v. Rutton*, 8 T. R. 547.

(e) 1 T. R. 5.

(f) See note to *Deerby v. Mazarine*, 1 Salk. 116.

therefore, and as a matter of justice to the creditor with whom she contracted, she ought to be free to contract, and to sue and be sued upon her contract, as if she were a feme sole, without reference to whether the contract bound her within or beyond the allowance. But in *Marshall v. Rutton*,^(g) the question again arose for judgment, and was twice argued before the whole Judges. Lord Kenyon pointed out the inconvenience and confusion in the law as to married persons, which the decision in *Corbet v. Poelnitz* would occasion, by making the same person a feme coverte in certain circumstances, and a feme sole in others; and observed, that a creditor, if he chose to trust a married woman upon the strength of her separate allowance, was in no worse situation than where he trusted other persons upon no other security than their honour; and gave it, as the unanimous decision of all the Judges, that the decision in *Corbet v. Poelnitz* was not good law, and that an action could not be maintained against a married woman, because she had a separate allowance from her husband, however ample that allowance might be. In a previous case, *Ellah v. Leigh*,^(h) it had been found, that a woman living apart from her husband, with an allowance of alimony by decree of the Ecclesiastical Court, could not be sued without her husband.

All the cases which have determined that the husband is not liable upon the general contracts of the wife, and cannot be sued even for necessities supplied to her, where he has given her a separate allowance, although the creditor may not have had notice of the allowance, proceed upon this, that [*32] a party dealing with a married woman is *bound to inquire, before contracting with her, into the circumstances under which she is about to contract; and that if he omit to do so, sibi imputet.

Divorce a mensa et thoro, for adultery, does not destroy the relation of marriage; it merely suspends for a time some of the obligations arising from the relation, but it does not create any change with respect to the capacity of the wife to sue or be sued; the relation continuing, the wife cannot sue or be sued without the husband.⁽ⁱ⁾

Where a wife has voluntarily withdrawn herself from her husband's protection under circumstances which do not justify her in so doing, as where she has eloped with an adulterer, or where she has committed adultery after having quitted her husband's house under justifiable circumstances, the husband is not bound to receive her into his house, should she offer to return; neither is he, in such case, as has been seen, liable for necessities supplied to her; yet even then an action would not lie against the wife for the price of the necessities.^(k) As neither the husband nor the wife can be sued, the consequence is, that all source of credit is withdrawn from the woman; and in the absence of mercy from her husband, starvation or the workhouse must be the lot of her whom her own weakness or the cruelty of others has brought into this unhappy situation.

If a married woman, living apart from her husband under any circumstances, justifiable or otherwise, defeat the prudent inquiries of those with whom she is about to deal, by concealing or denying her coverture, and fraudulently representing herself to be sole, although the circumstance of

(g) 8 T. R. 545

(h) 5 T. R. 679.

(i) *Lewis v. Lee*, 3 B. & C. 298.

(k) *Marshall v. Rutton*, 8 T. R. 547; *Gilchrist v. Browne*, 4 T. R. 766.

the creditor having made inquiries should not put him in a better situation as against the husband, or make the *husband liable, when he would not otherwise be liable; yet on principle it ought to alter the creditor's situation with regard to the woman, and should make her liable both to action and to personal execution for the debt contracted under such fraudulent circumstances, in the same way that an infant guilty of fraud is made liable for it. Accordingly, if a married woman contract as if she were sole, the Courts will not interfere to prevent the creditor suing against her those remedies which the law allows. Thus, where a married woman had accepted a bill in her own name, the Court refused to discharge a bail-bond granted by her, and to allow her to enter a common appearance in an action by an indorsee for value; (l) and while arrest upon mesne process was allowed, the Courts invariably refused to discharge a married woman from custody, who had imposed upon the creditor the belief that she was a feme sole, and put her to plead her coverture in ordinary form. (m) In *Fream v. Mitford*, (n) a married woman living apart from her husband ordered goods, which were supplied by the tradesmen on the supposition that she was a widow, but without her having done anything to create that supposition; and afterwards, on being pressed for payment, she offered to give her own bill for the amount. The Court ordered her bail-bond to be cancelled, but expressly on the ground that she had not deceived the creditor at the time of contracting the debt; leaving the inference, that, if she had deceived him, she would have been open to execution.

If the argument, *ab inconvenienti*, for treating a married woman as such in every case, which was used in *Marshall v. Rutton*, were followed out, the circumstance of the husband having been absent from the kingdom at the time at which the contract with the wife was entered into, should not make *any difference as to her exemption from liability; but the circumstance has given rise to questions of considerable intricacy and difficulty, according as the absence of the husband may have arisen from one cause or another. Where the husband has been banished the kingdom for life, or has abjured the realm, (o) he is considered dead in law, and the effect, as to the subsequent contracts of the wife, is the same as if he were naturally dead, and supports them, in favour of or against her, as if she were a feme sole. (p) Where the sentence of banishment was only for a limited period, *Yates, J.*, and *Lord Mansfield*, (q) held, that, during the period of banishment, the wife's disability was suspended only, and that she was so long a feme sole; and in *Carrol v. Blencoe*, (r) where the action was for goods sold, brought in her own name by a married woman, whose husband had been transported for seven years, a period which had expired at the date of the contract, *Lord Alvanley* ruled, that the record of the husband's conviction supported the action, 'as the husband had abjured the realm, and that the right remained in the plaintiff, unless the husband had in fact returned, and that the onus lay upon the defendant alleging it to

(l) *Prichard v. Cowlan*, 2 Marsh. 40. See also *Welsh v. Gibbs*, 4 Dowl. 683.

(m) 5 C. & P. 481.

(n) 1 C. & M. 54.

(o) See note (B) to *Newsome v. Bowyer*, 3 P. Wms. 38, as to Abjuration.

(p) Co. Litt. 132, b.; *Portland v. Progers*, 2 Vern. 104.

(q) *Corbet v. Poelnitz*, 1 T. R. 7.

(r) 4 Esp. 27.

prove that the husband had returned. But in *Marsh v. Hutchinson*,^(s) which occurred shortly before *Carrol v. Blencoe*, Lord Eldon, anticipating the question which arose in that case, spoke of it as suggesting many difficulties.

Where the absence of the husband from the kingdom, at the time at which the contract was entered into, was *voluntary*, this gives rise to difficulties, harder of solution upon principle than where his absence is *involuntary*. In *Wilmot's case*,^(t) action of trespass by a woman, whose husband was in Portugal, suing as if she were a widow, was sustained [*35] *"because of the impossibility of trial;" and in *Walford v. De Pienne*,^(u) where the action was for goods sold to a married woman, whose husband had come into this country as a French emigrant, and after residing in it had, six years before the action, gone to Sweden, and entered the Swedish service, and never returned to this country, Lord Kenyon sustained the action, observing that the case came within the rule of the old common law—where the husband had abjured the realm—there was a desertion of the realm by the husband, who was no longer domiciled in it; and if the wife were not held to be liable, she might be starved. But in *Marsh v. Hutchinson*,^(v) where the action was for goods sold to a married woman, whose husband, an Englishman, had gone to Holland, and resided there with his family as British consul, until the office was put an end to by the breaking out of war, when he sent his wife and family to England, but continued himself to reside in Holland, for the management of his property and with a view to recovering his office in case of peace, the plaintiff was nonsuited, because the defendant was a feme covert. And in *Kaye v. De Pienne*,^(w) where the circumstances were the same as in *Walford v. De Pienne*, with this addition, that the husband had come to England after the decision in that case, and had afterwards returned to Sweden, Lord Ellenborough dissented from Lord Kenyon's ruling in *Walford v. De Pienne*, and observed, that since *Marshall v. Rutton* the old common law had been restored, and the defendant could not be sued; a woman once a feme covert did not become a feme sole, because her husband went abroad; the husband was not under any legal disability to rejoin his wife. And in *Boggett v. Frier*,^(x) the Court refused to sustain action of trespass by a married woman, [*36] *whose husband had, five years previously, gone to America, and who *had thenceforth lived by her own exertions, trading as a feme sole.

Where the husband has been banished the kingdom for life, or has abjured it, so far as regards any civil rights between him and his wife or any other person, he is legally dead, and it requires less of a fiction to treat him as such than to consider him as alive; but where his absence, whether originating in choice or legal presumption, will be, or may be, but temporary, to treat him by fiction as if dead requires more violence to reason, while it disregards most of those legal inconveniences, which, in *Marshall v. Rutton*, were considered sufficient to refute the fiction, that a married woman was to be treated as a feme sole, because she had a separate allowance. *Marsh v. Hutchinson* and *Kaye v. De Pienne* seem to establish that a feme covert cannot be sued upon contracts made by her in her husband's

(s) 2 B. & P. 233.

(s) 2 B. & P. 226.

(t) Moor. 851.

(w) 3 Camp. 123.

(u) 2 Esp. 554.

(x) 11 East, 301.

absence from the kingdom, where that absence is voluntary on his part; and the reasons on which the judgment in these cases was founded would probably occasion the same judgment, where the absence arises from temporary banishment, should such a case again occur.

If the husband were an alien, and had never at any time been in this country, Lord Ellenborough said, in *Kaye v. De Pienne*,^(a) that in such case the wife could be sued as a feme sole; but why this should be so, or why in this case, where the husband's non-liability arises from local absence, as in those where it arises from the rule of law, the creditor should not be put to inquire before dealing who it is he is about to deal with, persons married in one country being married persons in any other country, is not very apparent, and seems questionable upon principle. Indeed, in *Barden v. Keverberg*,^(b) the Court granted a new trial, in an action against the wife of an alien, who had never been in this *country, upon a contract made by her, because it had not been proved that she had dealt as [*37] a feme sole; and in the course of the argument, Parke, B., said, "The law does not make a married woman liable as a feme sole, merely because her husband is an alien and continually abroad."^(c)

While there is every reason in principle why a married woman should not be allowed to sue or be sued upon contracts, which by every analogy of the law must be the husband's and not hers, there seems neither reason nor principle why the husband should be allowed, capriciously, either to refuse to assert the wife's rights, or to withhold his sanction to her asserting them, when no liability will thereby be inferred against himself. Accordingly, where a husband, who had been abroad for many years, refused to prosecute a suit in the Ecclesiastical Court for proving a will, or to sign the papers necessary for enabling his wife to prove it, the Court appointed a proctor for the wife to sue by herself;^(d) and where a husband and wife had executed a deed of separation, by which he agreed that she should be at liberty to recover any property, real or personal, to which she might be entitled, and covenanted that he would not interfere with her in so doing, but would do every thing necessary to assist her, the Court, in an action by the wife, as executrix, against a debtor to her testator's estate, refused to receive a release of the debt by the husband, which the defendant tendered as an answer to the action.^(e)

In all cases, except, perhaps, where the married woman has fraudulently represented herself as being sole, and where the husband has abjured the realm, and those which have been mentioned as coming within the particular custom of the city of London, a married woman can only be sued in conjunction with her husband, if she is to be sued at all: *whether she is to be sued at all will depend upon the period at which the cause [*38] of action arose, where it is founded upon the wife's contract.

If the cause of action arose before marriage, the action must be directed against the husband and wife jointly;^(f) so, also, if the action will survive to the wife after the husband's death, as in the case of trover for that property

(a) 3 Camp. 123.

(b) 2 M. & W. 61.

(c) See also *Stretton v. Busnach*, 1 Bing. N. C. 139.

(d) *Suter v. Christie*, 2 Ad. Eccl. Rep. 150.

(e) *Chambers v. Donaldson*, 9 East, 471; *Innell v. Clement*, 4 B. & Ald. 419.

(f) *Mitchinson v. Hewson*, 7 T. R. 348; *Richardson v. Hall*, 1 Bro. & Bing. 50.

which if not reduced into possession during the coverture would survive to the wife.(g) But if a feme sole marry after action brought, the defendant may plead the marriage in abatement; if he do not do so, and the plaintiff obtain judgment and sue out a writ of fieri facias in her own name, the writ will not be discharged.(h) If action of ejectment were brought against a feme sole, who married before judgment, the judgment, if given, might be used against her; for it is recovered because she has no right or interest in the premises, and by consequence her husband cannot have any as in her right.(i)

If the contract have been made during the marriage, the action must be directed against the husband alone, the contract being void as to the wife;(k) and so, if the action be founded upon a contract previous to marriage, a promise by the wife during marriage cannot be averred in support of it,(l) for such promise is void.

If the action is founded upon a tort committed by the wife, it must be directed against both husband and wife, whether the tort was committed before or during the marriage.(m) Unless, indeed, the tort, though committed by both husband and wife, is to be considered as the act of the [*39] *husband alone, as on a conversion by both; then trover will lie against the husband alone, for the wife cannot acquire property by conversion.(n)

When the custom of the City of London, which has been before spoken of,(o) is pleaded in defence to an action, or incidentally in the superior courts, it is recognised and given effect to; but if action is brought, founded upon the custom, this must be done in the courts of the city where alone the custom can be sued upon;(p) and the husband must be joined with the wife in the action, for conformity sake, although the wife and her estate in the trade are alone chargeable.

If the action is rightly brought against husband and wife, the wife will be liable to be taken in execution upon a *capias ad satisfaciendum*, notwithstanding her coverture and that thereby all means for her personally satisfying the judgment have been withdrawn from her.(q) While arrest upon *mesne process* was part of the law, if the husband and wife were taken, the wife was always discharged upon common bail,(r) and she was also discharged if she had been rendered to prison in discharge of the bail for her and her husband;(s) but where she and her husband were taken *in execution*, the Courts have refused to discharge her: she seems, however, to have this protection against being kept in confinement through the husband refusing to satisfy the judgment, that the Courts require that the husband shall bear her company in the confinement; for they do not refuse her application to be discharged, until satisfied that there is no collusion.

(g) *Ayling v. Whicher*, 6 Ad. & E. 259.

(h) *Walker v. Golling*, 2 Dowl. N. S. 776.

(i) *Doe d. Taggart v. Butcher*, 3 M. & S. 557.

(k) 4 Vin. Abr. 93, pl. 5.

(l) *Morris v. Norfolk*, 1 Taunt. 212; *Pittam v. Foster*, 1 B. & C. 248.

(m) 2 Saund. 47, n. (l); *Vine v. Saunders*, 4 Bing., N. S., 96; *Swithin v. Vincent*, 2 Wils. 227; Com. Dig. "Baron and Feme," Y.; *Head v. Briscoe*, 5 C. & P. 484.

(n) 2 Saund. 47, n. (l); *Rhemes v. Humphreys*, Cro. Car. 254.

(o) Ante, p. 18.

(p) *Beard v. Webb*, 2 B. & P. 103, and cases there cited.

(q) *Anon.*, 3 Wils. 124; *Chalk v. Deacon*, 6 Moor. 128.

(r) *Ibid.*

(s) *Roberts v. Andrews*, 2 W. Bl. 720.

between the creditor and the husband to keep her in durance;(t) and in one case, where the wife had been taken in execution, the husband being at large, the Court *required to be satisfied that endeavours had been made to take him, and that there was no design to screen [*40] him.(u)

A married woman has also this protection against perpetual confinement, that, by the 72d section of the Insolvent Act,(v) she is entitled to the benefit of the act, upon assigning to the provisional assignee all her separate estate and property, of any kind, over which she has a disposing power, or which shall be vested in trustees or other persons for her benefit, and delivering up all personal property of which she has possession, and also all property to which she shall be entitled in possession, reversion, or remainder, subject to the right of her husband therein, and executing a warrant of attorney to confess judgment for the amount of her debts remaining unpaid.

It must be observed, however, that coverture no way interferes with the liability of a married woman for debts or obligations duly contracted by her before or during the coverture, so far as that liability can be made effectual out of any estate of which she may be possessed to her separate use. Her creditor, therefore, may sue both her and her husband, obtain judgment, and take them in execution; but the wife, so long as the coverture lasts, will be discharged from custody, on shewing, by affidavit, that she has no separate estate out of which the debt can be made available.(x)

Although the husband, as has been seen, becomes liable for the debts of the wife contracted prior to marriage, the coverture does not extinguish, but only suspends, her liability. Upon the death of the husband, leaving her surviving, without the debt having been discharged, the liability of the wife to fulfil her obligation revives.(y)

*CHAPTER VII.

[*41]

LIABILITIES OF THE HUSBAND IN RESPECT OF ACTS OF THE WIFE PRIOR TO AND DURING COVERTURE.

FROM what has been said, the reader will have perceived that the remedy of the creditor of a married woman, in respect of any act done or liability incurred by her prior to coverture, so far as such remedy can be directed against her personally, is entirely suspended, if not destroyed, by the supervening coverture; and that he never obtains a right of personal recourse against her, in respect of any act done or liability incurred by her during the coverture, if it is free from the taint of fraud in regard to the character she may have assumed at the time of doing or entering into it, by represent-

(t) *Pitts v. Meller*, Strange, 1167.

(u) *Finch v. Duddin*, Str. 1237.

(v) 7 Geo. 4, c. 57.

(x) *Sparkes v. Bell*, 2 B. & C. 1; *Newton v. Rowe*, 7 M. & G. 329; *Evans v. Chester*, 2 M. & W. 847; *Doe v. Butcher*, 3 M. & S. 557; *Cooper v. Munchin*, 4 East, 521.

(y) *Woodman v. Chapman*, 1 Camp. 189.

ing herself to be sole or discovert. This obstruction to justice, created by the coverture, suggests an inquiry as to the extent of relief which the creditor can obtain against the husband instead of the wife.

§ 1.—*Liability of Husband in respects of Acts of Wife prior to Marriage.*

With regard to those obligations of the wife which were only initiate at the period of the marriage, they cannot be perfected by her, since her status for independent action is suspended by the marriage; and, if they were perfected, they could only be made effectual out of the property of the husband, to whom, by the marriage, the whole of the wife's personal property has been transferred.^(a) As marriage, however, gives the [*42] husband a right to the whole of the wife's personal property, whether in possession, action, or contingency, so it subjects him, so long as the coverture lasts, to liability for all her debts contracted prior to and owing at the time of the marriage,^(b) and for breaches of trust committed by her prior to that time.^(c)

But this liability (subject to a qualification which will be presently noticed in respect to proceedings adopted by the creditor) ceases with the coverture, so far as regards the right of the creditor to make good his demand, either out of the husband's own proper funds, or out of the funds of the wife which may have come to him *jure mariti*,^(d) without reference to whether these last may have been greater or smaller; for as he would have been liable during the coverture, though he had not received any thing at all by the wife, so, when the coverture ceases, his liability should cease, although he may have received something by her.^(e) If the coverture is put an end to by the pre-decease of the husband, the liability of the husband which existed during the coverture will not transmit against his representatives, but will revive against the wife, the original debtor.^(f)

Whether the creditor has used proceedings prior to or during the coverture, for recovery of his demand, his right to have payment from the husband will depend upon the state of those proceedings at the period when the coverture terminates. Thus, if he had recovered judgment against the wife alone *dum sola*, and she die before he has sued out execution upon it, his right to recover from the husband will be gone, unless, in the case supposed, he had brought a *scire facias* against the husband, and obtained judgment upon it before the death of the wife, which he *might do.^(g) [*43] But if, during the coverture, the creditor obtain judgment against both husband and wife, his right to recover payment from the husband will remain, although the wife should die before execution sued out; for from the date of the judgment, in either case, the debt became the debt of the husband.

(a) Anon., Salk. 117.

(c) Palmer v. Wakefield, 3 Beav. 227.

(e) Thomond v. Suffolk, 1 P. Wms. 468.

(f) Woodman v. Chapman, 1 Camp. 189.

(b) 1 Roll. Abr. 351, F. 1.

(d) Heard v. Stamford, 3 P. Wms. 409.

(g) Cooper v. Munchin, 4 East, 522.

Marriage is not a gift to the husband of what the wife or he in her right obtained in *autre droit*. If, therefore, the husband have obtained property, not *jure mariti*, but as executor or administrator of his wife, which he would be bound to administer in that character, or which she had obtained in that character, and which he in her right would be bound to administer for her, the right of the creditor to recover out of these funds continues, although the coverture may have terminated; for the marriage was no gift in law of what the wife, or the husband for her, held in *autre droit*.^(h)

§ 2.—*Liability of Husband in respect of Acts of Wife during her Coverture.*

As already observed, the wife has no power during the coverture, to enter, of her own authority, into any contract which will be binding either upon herself or upon her husband. But if she do enter into a contract of her own authority, such contract will not be void *ab initio*: for, should the husband adopt it, it will be binding upon him as if originally made with his authority; and should he neither agree nor disagree, it will also be good.⁽ⁱ⁾ While the wife's status for independent action is suspended by the marriage, *there is nothing, as has been also seen,^(k) in her condition with relation to her husband to prevent her from acting as his agent: [*44] whatever, therefore, she does with the authority or acquiescence of the husband, will bind him; as if he authorise or recognise her receipt or payment of money, or permit her to carry on trade, the obligations she makes in these respects will bind the husband as if made by himself.^(l) But, in order to bind the husband, the obligation made by the wife must come strictly within the authority given by the husband.^(m)

From what has been already said with regard to the powers of the wife to make domestic contracts,⁽ⁿ⁾ the extent of the husband's liability in this respect will be gathered. Without resuming what has been said elsewhere, it is sufficient to say here, that the husband is liable to perform every contract which the wife, as head of his family, has made either with his presumed or implied authority; that all domestic contracts made by the wife, while she and the husband are cohabiting, and so long as he has not expressly withdrawn his authority from her, and which, with reference to the matter of them, are not palpably extravagant and unsuited to the husband's circumstances in life, will be presumed to have been made with his authority; and that all contracts by the wife, for the supply of necessities to herself, where the husband has failed to provide her with them, although his liability to do so continues,^(o) and she is not provided with them from other sources, and where she has not been guilty of adultery, have the implied authority of the husband.

(h) *Powell v. Bell*, Pre. in Ch. 255; *Sanderson v. Crouch*, 2 Vern. 118.

(i) Co. Litt. 3, a.; *Manby v. Scott*, 1 Sid. 109; *Granby v. Allen*, 1 Ld. Raym. 224.

(k) Ante, p. 16.

(l) Ante, p. 16, and cases there cited.

(m) *Goldstone v. Tovey*, 3 Jur. 1175.

(n) Ante, p. 19.

(o) See ante, p. 21.

[*45] *§ 3.—*Liability of Husband in respect of Devastavit committed by the Wife as Executrix or Administratrix.*

There still remains to be noticed the husband's liability for devastavit committed by the wife, as executrix or administratrix. The nature of this liability will be best seen by considering the rule at law upon the subject, separately from the rule in equity, and marking the distinction between the liability while the coverture lasts, and after it has terminated.

At law, if a woman, administratrix or executrix, commit a devastavit, and *afterwards* marry, so long as the coverture lasts, her husband will be liable to make good the devastavit, upon the ordinary rule of law, that, during the coverture, he is liable upon all her obligations.^(p) And, under the terms of 30 Car. 2, c. 7, and 4 Will. & Mary, c. 24, s. 12, this liability will continue even after the termination of the coverture, if the husband, with the view of taking up any property of the wife which had not been reduced into possession during the coverture, should take out letters of administration to the property; for these statutes enact, that every executor or administrator of any person, who, as executor or administrator, shall have wasted the goods of the deceased, shall be liable in the same manner as the executor or administrator committing the waste would have been liable if living. At law, also, if a married woman, executrix or administratrix, commit devastavit *during* the coverture, the husband will be liable to make it good so long as the coverture lasts, for the act, though done by the wife, is presumed to be the husband's, as she cannot do any act without his consent; and this will be the case even although the husband should, at the time of the act of *devastavit, have been living apart [*46] from the wife.^(q) But in both of the cases which have been mentioned, provided the husband has not made himself executor or administrator to the wife, the death of the wife or of the husband discharges the husband and his representatives of all legal liability. The same rule which charges the husband during the coverture with the wife's liabilities, discharges him upon its termination. This rule of law, however, in regard to devastavit committed during the coverture, proceeds more upon the absence of any form of action which could be directed against the husband, than from the want of legal principle on which the husband would be liable, not perhaps to the consequences of devastavit, considered as a tort, (action for which dies with the person), but to make good the property of another which he had become possessed of by wrong.^(r) If, however, a general judgment upon a scire fieri inquiry, or in an action of debt on a devastavit, were obtained in the wife's lifetime, the husband would be chargeable upon the judgment; but he would not be chargeable if the judgment were *de bonis testatoris* only.^(s)

In equity, the rule is the same as at law, in regard to waste committed by the wife *before* her marriage; the husband's liability continues during the coverture, and ceases with it, without regard to whether he may or may not

(p) *Kings v. Hilton*, Cro. Car. 603; *Hayward's case*, Moore, 761.

(q) *Paget v. Read*, 1 Vern. 143; *Adair v. Shaw*, 1 Sch. & Lef. 266.

(r) *Adair v. Shaw*, 1 Sch. & Lef. 261.

(s) *Mounson v. Bourn*, Cro. Car. 519; *Baron v. Berkley*, 1 Lut. 670.

have received any fortune, greater or less, with the wife. If the liability has been ascertained by decree during the coverture, the decree may be enforced after the coverture has ended; but if this has not been done, the courts of equity have not established any rule for relief *against* the husband, for devastavit committed by the wife before marriage, founded upon the circumstance of the husband having received a fortune with the wife; because, by parity of reasoning, if it *did* adopt such a rule, it would be necessary to afford relief to the husband against a judgment or decree re- [*47] covered during the coverture, in respect of devastavit, if in such a case the husband had not received any fortune with the wife, which, in *Heard v. Stamford*,^(t) Lord Talbot said it was not in his power to do; and in a similar case^(u) Lord Macclesfield used these observations: "The husband during the coverture is answerable for the wife's debts; and as, perhaps, this may be hard when he has nothing with her, so you are to set against such hardship, that, if the husband has received a personal estate with his wife, and happens not to be sued during the coverture, he is not liable."

With regard, however, to devastavit committed by a married woman, executrix or administratrix, *during* coverture, which, as already observed, is considered to be the act of the husband, whether in fact done by him or by the wife, the rule in equity is different from that at law. Equity, while it recognises the general rule of law, that the husband's liability for debts contracted by the wife shall cease with the coverture,^(v) draws a distinction where the liability arises in regard to acts of devastavit committed by the wife, as executrix or administratrix, during the coverture. As the wife cannot do anything in these characters without the assent of the husband, and he may act even against her will, devastavit committed during the coverture is treated as the act of the husband himself, whether the fund wasted has come to the hands of himself or of the wife; he is made liable, therefore, not so much in his character of husband as of executor or administrator, as the case may be. So far, law and equity agree; but while at law the liability of the husband in such a case ceases with the coverture, unless the liability has been established by judgment recovered before the termination *of* the coverture, it is not so in equity, which, upon its ordinary principle, that persons coming into possession of money bound by [*48] a trust shall be chargeable as trustees, makes the husband liable without regard to the termination of the coverture; accordingly, in *Adair v. Shaw*,^(w) a husband was decreed to make good after the death of his wife money which had come to the wife as administratrix pendente lite, and which she alone, or together with him, had wrongfully paid over to parties not entitled to it. And, in a later case,^(x) Lord Cottenham decreed the estate of a husband to make good a fund of which his wife was one of two executors, and which had been lost by its having been deposited in a bank in the name of the co-executor, and of the husband instead of the wife, whereby the co-executor had been enabled, after the death of the husband, to draw out the money without the wife surviving having it in her power, as his co-executrix, to prevent him so doing. His Lordship held the devastavit

(t) 3 P. Wms. 412.

(u) *Thomond v. Suffolk*, 1 P. Wms. 468.

(v) *Heard v. Stamford*, 3 P. Wms. 409; *Thomond v. Suffolk*, 1 P. Wms. 468.

(w) 1 Sch. & Lef. 272.

(x) *Crough v. Bond*, 3 My. & Cr. 490.

to consist in the improper deposit during the coverture, and that nothing had occurred which could discharge the husband from liability for the money which had come to his hands.

[*49]

*BOOK III.

RIGHTS GIVEN BY THE MARRIAGE TO THE HUSBAND IN THE PERSONAL PROPERTY OF THE WIFE.

HAVING disposed of the liabilities of the wife and of the husband to third parties for performance of engagements entered into by the wife either before or during the coverture, we shall now consider the rights which marriage gives to the husband in the property of the wife; and, first, as to her personal property.

Marriage is a gift to the husband of the whole personal property of the wife, which, in its operation, is absolute or conditional, according to the nature of the particular property affected by it.

CHAPTER I.

RIGHTS ACQUIRED BY THE HUSBAND IN THE PERSONAL PROPERTY OF THE WIFE IN POSSESSION.

MARRIAGE is an *absolute* gift of all personal estate, which is either actually in possession of the wife, at the time of the celebration of marriage, or which comes into actual possession during the continuance of the coverture. Accordingly, the husband may, in his own name alone, bring action of detinue or replevin for recovery of the wife's personal chattel which has [*50] got into the hands of third parties; (a) *and, if conversion of the chattel take place, subsequent to marriage, the tort is to the husband alone, and he may bring action of trover in his own name alone. (b) If the conversion took place prior to the marriage, the husband may, if he choose, join the wife with him in the action of trover, taking care, however, not to allege the conversion to have been to the damage of both. (c)

The gift of the personal estate is wholly independent of the circumstance, whether the husband and wife may have continued, or may have ceased to cohabit. Thus in *Agar v. Blethyn*, (d) a legacy, which had been given to a

(a) Bull. N. P. 50 and 53 a.

(b) *Powis v. Marshall*, 1 Sid. 172.

(d) 2 Cr. M. & R. 699.

(c) *Nelthorpe v. Anderson*, 1 Salk. 114.

married woman, who, at the time of the bequest, was living apart from her husband in a state of adultery, and which had been received by the wife, and vested by her in trustees for herself and her illegitimate children, was, after her execution for murder, found to belong to her husband surviving, without being chargeable even with the costs, which the trustees had expended for the wife's defence upon her trial.

*CHAPTER II.

[*51]

RIGHTS ACQUIRED BY HUSBAND IN THE CHOSES EN ACTION OF THE WIFE.

§ 1.—*Nature of the Gift, and what included under it.*

MARRIAGE is a conditional gift to the husband of the personal estate of the wife, not capable of immediate tangible possession, but which may be reduced into possession by action at law or suit in equity; and the condition of the gift is, that the estate shall be reduced into possession during the coverture. (a) In default of this reduction into possession, the wife surviving takes the chose in her own right, against the representatives of the husband, (b) and she takes not only the chose itself, but the profits which have accrued from it, although they may have arisen in the lifetime of the husband. Thus, in *Wilkinson v. Charlesworth*, (c) the wife surviving was found entitled to the dividends on a sum of stock which had accrued in the lifetime of the husband, but which had not been paid to him, as well as to the stock itself, which he had not reduced into possession.

On the other hand, if the husband survive the wife, he will take the chose no doubt, although he may not have reduced it into possession in her lifetime; but he will do so, not, *jure mariti*, by virtue of the gift by marriage, but under his title to be the administrator to his wife; (d) *and if he should die before having obtained possession in this way, his legatee or next of kin will be entitled to the chose, although neither of them will be entitled to ask of the ecclesiastical court administration *de bonis non* of the wife, as their title for its recovery. That title will be granted to the next of kin of the wife, in obedience to the 31 Ed. 3, c. 11; but in equity they will be treated as trustees for the legatees or next of kin of the husband, whose right to the chose will in this way be made effectual. (e) In order to entitle the administrator *de bonis non* of the wife to recover the chose, it will not be necessary for him also to administer to the husband, in case he should have died intestate, as, in *Gutteridge v. Stilwell*, (f) was supposed by the parties to be necessary.

(a) Co. Litt. 300, a.

(b) Co. Litt. 351, b; *Langham v. Newry*, 3 Ves. 469; *Scawen v. Blunt*, 7 Ves. 294.

(c) 11 Jur. 644.

(d) *Squib v. Wyn*, 1 P. Wms. 380.

(e) *Humphrys v. Buckle*, 1 Atk. 458; *Elliott v. Collier*, 3 Atk. 527.

(f) 1 My. & K. 486.

The gift by marriage to the husband of the wife's choses en action includes debts resting upon obligation, contract, or other security, and not only those presently vested in interest, and capable of being immediately reduced into possession, but those rights which are contingent upon some event, or which are reversionary after some prior interest.

Money lent upon mortgage prior to the marriage, to which the wife is entitled, will fall under the gift, although the covenant in the mortgage deed may be for payment to heirs or executors. In *Turner v. Crane*,^(g) Lord Keeper North hesitated to decree in favour of the husband, against the heir of the wife, because "there was no covenant for payment of the mortgage money, which alone gives the executor title to the mortgage money;" but in making this observation, his Lordship overlooked what Coke says:^(h) "Though the executor be not named, yet the law appoints him to receive the money; but so doth not the law appoint the heir to receive the money, unless he be named;" and *also a previous decision of Lord Nottingham, C., in *Thornborough v. Baker*,⁽ⁱ⁾ that where neither heir nor executor is named in the covenant, the executor is entitled; and that where both are named, and the mortgagor has allowed the day of payment to pass, without making the election between them, which the deed gave him, then the executor is entitled. This case, and — *v. Hicks*,^(k) having established that the executor of a mortgagee would be entitled to the mortgage money, there seems little doubt that the husband of a feme covert mortgagee would be entitled to enforce the covenant for payment of the mortgage money, either during the wife's life, or after her death; and that, if she survived him, she would be entitled to do so in her own right.^(l)

Arrears of rents service, charge, or seck, will also fall under the gift by marriage; but if they should not have been recovered by the husband in his lifetime, they will belong to the wife surviving, as accessories of the rents.^(m) If the husband survive the wife, he will take not only the arrears which accrued during the coverture,⁽ⁿ⁾ but according to Coke, by virtue of 32 Hen. 8, c. 37, those arrears which accrued *before* the marriage. If this be correct, the right must be derived from the words of the statute, that the husband may distrain for the arrears, in like manner and form "as he might have done, if his wife had then been living;" for the statute does not make any express reference to arrears accrued prior to marriage. This statute does not apply to copyhold lands, but is confined "to rents out of free lands."^(o)

Arrears of rents reserved on leases for years, like any other chose en action of the wife, will belong to the husband: *but, according to [*54] the decision in *Prescott v. Boucher*,^(p) the remedy given by this statute of Henry will not apply for the recovery of them, because a person seised of lands in fee, and demising them for years, reserving rent, neither was nor could be tenant in fee simple, fee tail, or for term of lives, or tenant

(g) 1 Vern. 170.

(h) 210, a.

(i) Cas. in Ch. 283.

(k) 1 Vern. 412.

(l) See *Rees v. Keith*, 11 Sim. 388.

(m) Co. Litt. 351, a; *Temple v. Temple*, Cro. Eliz. 791; *Salway v. Salway*, Dick. 434; 4 Vin. Abr. 118, pl. 3.

(n) Co. Litt., ubi supra; 4 Vin. Abr., ubi supra.

(o) *Appleton v. Doily*, Yelv. 135; *Brownl.* 102; Bull. N. P. 57.

(p) 3 B. & Ad. 849.

at all of the rent. This decision was followed in *Jones v. Jones*.^(q) But the law was afterwards altered by 3 & 4 W. 4, c. 42, which, in its 32d section, gives power to the executors or administrators of any lessor to distrain upon lands demised "for any term or at will," for arrears of rent due to such lessor, in like manner as the lessor might have done in his lifetime; and by the 38th section, even although the term may have expired, if the distress be made within six months of the expiry. A husband, therefore, surviving his wife, by whom a demise for years had been made, prior to marriage, may, as her administrator, distrain for arrears of rent accrued upon the demise prior to or during the coverture.

It was at one time thought,^(r) that bills of exchange and promissory notes, from their peculiar nature as transferable documents, passing from hand to hand by indorsement, were in the nature of chattels in possession, rather than choses en action, and vested in the husband by the marriage, without more being done; and the judgment of the Courts of law in two cases^(s) proceeded upon this notion. The second of these cases went entirely upon the authority of the first; but in both of them a previous decision of Sir Thomas Plumer, in *Nash v. Nash*,^(t) had been overlooked. In that case, his Honor held that a promissory note, given to a married woman, was a chose en action, which survived to her, if payment of it had not been obtained by the husband in his life. This decision of Sir Thomas Plumer was *adopted in two cases,^(u) in which the Courts of Queen's Bench and Exchequer disregarded the authority of *McNeil- [*55]* *age v. Holloway*, and *Ex parte Barber*, and which may now be considered as having settled that bills and promissory notes are choses en action, which when they have been given to a married woman must be reduced into possession by the husband, otherwise she will be entitled to take them if she survive.

§ 2.—*Acts in pais operating as a Reduction of the Choses into Possession, though not departing with the Property.*

It has already been said^(y) that marriage was a gift to the husband of the choses en action of the wife, conditional upon their being reduced into possession during the coverture; it is material, therefore, to know what acts will fulfil this condition, so as to bar the right of the wife to take the chose, in case she should survive the husband.

Mere intention by the husband to take possession of the wife's chose will not be sufficient to transfer the property to him. This purpose must be followed by some positive act changing the property, and divesting it out of the wife. Thus, where a husband applied to an executor for payment of a legacy bequeathed to his wife, but, to accommodate the executor, allowed

(q) 3 B. & Ad. 967.

(r) 1 Rep., Husb. & Wife, 214.

(s) *McNeillage v. Holloway*, 1 B. & Ald. 218; *Ex parte Barber*, 1 G. & J. 1.

(t) 2 Madd. 133.

(u) *Richards v. Richards*, 2 B. & Ad. 447; *Gaters v. Madeley*, 6 M. & W. 423.

(y) Ante, p. 51.

the money to remain in his hands at interest, which was paid to him for two half years, and died leaving a will, bequeathing the legacy to the wife for life, and after her death to his children by her, Lord Loughborough held, that all that was done was an admission by the executor of the legacy and of assets to pay it, and that the wife surviving was entitled to take it absolutely [*56] in her own right. (z) In another case, the father of A. gave *her a cheque on his bankers for £10,000, which she presented for payment; the bankers instead of paying the money, gave A. their promissory note for the amount, payable on demand. A. delivered the note to B. her husband, who allowed the money to remain upon the note. Sometime afterwards, B. obtained from the bankers, upon his own receipt, £1000 of the £10,000, and thenceforth, during the remainder of his life, he received interest upon the remaining £9000, which at his death was still in the bankers' hands upon the security of the note to A. In a question between A. and a legatee, under the will of her husband, Sir Thomas Plumer held, that the receipt by the husband of the £1000 and of the interest upon the £9000 did not alter the nature of the banker's note, which continued, as it was originally, the chose en action of the wife, and belonged to her surviving. (a) The authority of this case was doubted, (b) because of a supposed distinction between negotiable instruments, such as the banker's note, and other choses en action, but it has been confirmed by two subsequent cases. (c)

In *Shuttleworth v. Greaves*, (d) a married woman became entitled, as administratrix of her father, to shares in a canal, which thenceforth, without any actual transfer of them having been made to the husband, stood in the books of the canal company as those of "F. Shuttleworth and wife." In virtue of these shares, the husband was elected and acted as a committee-man, and received dividends to the day of his death. The Court held, that what had passed did not amount to reduction into possession, and that the shares continued the property of the wife surviving.

On the other hand, the fact of the husband having obtained [*57] *actual possession of the chose will not defeat the wife's right to it by survivorship, if such possession was obtained with another intention than that of changing the property, and divesting it out of the wife. Accordingly, a husband executor, who had proved his testator's will, entered into possession of his estates, and disposed of part of them in the terms of the will, was held not to have had such possession as would defeat the right by survivorship of his wife, who was one of the residuary legatees of the testator. (e) So a transfer of stock to which a wife was entitled as residuary legatee into the name of the husband and another, until a verbal agreement that the stock should be vested in trustees for the wife's separate use, and for the husband for life in case he should survive her, and after his death for their children as she should appoint, could be carried into effect, was held not to give such possession to the husband as could defeat the wife's right to the fund by survivorship, the transfer having been made *diverso intuitu*. (f)

(z) *Blount v. Bestland*, 5 Ves. 515.

(a) *Nash v. Nash*, 2 Madd. 133.

(b) 1 Rep., *Husb. & Wife*, 211, n.

(c) *Richards v. Richards*, 2 B. & Ad. 447; *Gaters v. Madeley*, 6 M. & W. 423.

(d) 2 Jur. 957.

(e) *Baker v. Hall*, 12 Ves. 497.

(f) *Wall v. Tomlinson*, 16 Ves. 413.

Mere possession, then, obtained by the husband as trustee or executor, will not defeat the wife's right by survivorship; so neither, as appears, will the fact of his having directed the chose to be vested in others, as trustees for the wife, have that effect. Thus, in *Ryland v. Smith*,^(g) a husband, instead of taking payment to himself of a bequest to his wife, requested the executors of the testator to pay it over to persons whom he named as trustees, for her separate use: Lord Cottenham ruled, that, the wife surviving, the husband took the fund absolutely; because, directing an investment consistent with the wife's equities could not be considered as destroying these equities by being a reduction into possession, as this would take away her right even to a settlement out of the fund. That decision seems *open to this observation, that the question was not how the wife's [*58] equity to a settlement was to be saved, but whether the husband had shewn such an exercise of property as amounted to reduction into possession. It seems difficult to say that he had not; and even as to her equity, the very act which destroyed it, gave her a settlement which the Court could enforce.

But this argument of protection to the wife's equity was disregarded in *Rees v. Keith*,^(h) although the act of the husband did not give any substitution for the equity. There the mortgagor had paid the mortgage money of a married woman to her husband; without having obtained a reconveyance. After the husband's death the wife was decreed to execute a conveyance, without being entitled to demand payment over again of the money, although she argued that this was to deprive her of her equity to a settlement, without satisfying which the husband could not have compelled payment from the mortgagor.

If, however, the trust authorised by the husband be one under which he himself will take a benefit, then the act done by him authorizing such a trust will be sufficient to divest the right of the wife by survivorship.

In *Burnham v. Bennett*,⁽ⁱ⁾ where the debtor in a promissory note, to which a married woman had become entitled prior to her marriage, gave his bond for the amount of the note to trustees; and a sum of stock, to which she was likewise entitled, was transferred to the same trustees, upon trust for her husband for life, then for her for life; and upon the death of the survivor of her and her husband, to pay and transfer the capital to their children as the wife should appoint; and in default of children to such persons as the wife should appoint by deed or will; and in default of such appointment to the husband, his executors, administrators, *and as- [*59] signs; and the wife survived the husband without having made any appointment; Sir J. Knight Bruce, V. C., held, that there had been reduction of the fund into possession by the husband, so as to defeat the wife's right by survivorship.

If the husband alone, or he and the wife together, authorise a third person to receive the wife's chose en action, this will divest the title of the wife, and be such a reduction into possession, as will support an action by the husband against the third party for recovery of the chose.^(k)

(g) 1 My. & Cr. 53.

(h) 11 Sim. 388.

(i) 2 Cbl. 255.

(k) Roll. Abr. 342, D. 7; *Huntley v. Griffith*, Moor. 452; Gold. 160.

With regard to bills of exchange and promissory notes, the decisions as yet only furnish means of saying negatively what will not amount to reduction of them into possession. In *Hart v. Stephens*,^(l) the Court of King's Bench held, that receipt of interest by the husband upon a promissory note, which had been given to the wife *dum sola*, did not amount to reduction by him into possession; and in *Scarpellini v. Acheson*, the same Court held, that indorsement made by the wife to a third party, on the authority of the husband, of a promissory note payable to herself, without any proof that the indorsement was made for value received by the husband from the indorsee, or as a gift from the husband to the indorsee, was not reduction into possession by the husband, so as to prevent the wife surviving from recovering upon the note, which had been returned to her by the indorsee. From an observation of Pattenon, J., in *Sherrington v. Yates*,^(m) it would seem that the decision in *McNeillage v. Holloway* went upon this, that the promissory note, being payable *to order*, the husband might have indorsed it to himself, which would have been reduction into possession; that action by him, in his own name, alone ^[*60] was sufficient for the same purpose, and the indorsement was, therefore, a mere idle ceremony. The judgment in *McNeillage v. Holloway*, though erroneous in giving the character of a chattel in possession to a bill of exchange, is authority for the position, that, where a note given to a woman *dum sola* is payable to order, indorsement of it by her husband to himself will be reduction by him into possession.⁽ⁿ⁾

§ 3.—*Effect of Husband's Assignment of the Wife's Chose en Action upon her Right by Survivorship.*

(a) *General Doctrine as to Assignment of Choses in Possession and en Action.*

From what has been already said, the reader will have learnt, that, in order to vest the chose en action of the wife in the husband, and divest her right to it in case she should survive him, it is necessary that the act of the husband, which is set up against the wife by those representing him, as sufficient to defeat her right by survivorship, must be one which was done by the husband, with the intent, either of vesting the chose in himself, or of dealing with it on the assumption that the right was already vested in him; and the effect in this respect of certain acts in pais of the husband has been considered.^(o)

It remains still to consider the effect, upon the right of the wife, by survivorship, to her choses en action, of an assignment or release of them by the husband; and, in order to the proper investigation of this subject, it will be necessary previously to draw attention to the power of the husband to make an assignment of the wife's personal property.

^[*61] *Marriage, as has already been shewn,^(p) is a gift of the general personal property of the wife; such personal property of the wife,

(l) 6 Ad. & E. 937.

(m) 12 M. & W. 855.

(n) See also *Connor v. Martin*, Str. 516.

(o) Ante, p. 55.

(p) Ante, p. 79.

therefore, as at the time of marriage was in the corporal possession of the wife, being by the marriage transferred to the possession of the husband, may be assigned or otherwise disposed of by him at his pleasure; but the choses en action of the wife, or such property as rested in obligation, and was demandable by action at the date of the marriage, or rather the right of such property, cannot *in law* be assigned by the husband, not from any peculiarity in the nature of the right given to him by the marriage, but from the general doctrine of law, that rights of this nature are not capable of being assigned. It is necessary to except from this doctrine, however, negotiable securities, such as bills of exchange and promissory notes, which pass from hand to hand by indorsement. These, though strictly choses en action, may in this way be transferred by the husband, so as to make a perfect right against the wife, as has been already shewn.(g) With respect to such property of the wife as, though not in her actual possession, nevertheless is not of the nature of a chose en action, such as an elegit upon a judgment issued before marriage, this in law is assignable,(r) and so also is the legal term of years of the wife.

Hitherto we have been speaking of the possibility of assigning the personal property of the wife, as such possibility is recognised in the Courts of *law*. The doctrines of equity are somewhat different. Analogous to the *legal* estate of the wife, spoken of above as being neither in possession, nor yet of the nature of a chose en action, are the following *equitable* estates: terms held in trust for the wife; money owing to her secured upon mortgage of such terms; decrees in equity for payment of money to the wife, *made dum sola, and decrees giving her right to hold premises [*62] until the money should be paid. These rights are regarded in equity as being assignable.(s)

Money owing to a married woman, whether secured upon a mortgage *in fee* or of a *term*, is in equity treated as a chose en action, and as such is assignable.(t) With regard to the *legal* estate of the two securities, there is a discrepancy. Where the mortgage is upon the security of a term, the term itself, as a chattel real, vests conditionally in the husband ipso facto of the marriage, as will be afterwards seen; but where the security is upon a mortgage in fee, the *fee*, notwithstanding the marriage, remains in the wife, and cannot be taken out of her but by some act on her part sufficient for that purpose. However, as equity treats the estate in the lands as a mere security for the money advanced, and the covenant to pay the money as the wife's chose en action, the fee, after payment of the money to the husband or assignment of it by him, remains a dry trust in the wife.(u)

Upon the general doctrine of law applicable to choses en action, an assignment of a chose en action will be void *in law*, as has been seen.(v) But *equity* regards such an assignment as an agreement by the assignor to give the assignee the benefit of the right assigned, and as such gives effect to it.(w)

Chattels personal in possession being thus assignable, both at law and in equity, and choses en action being assignable in equity, let us next consider

(g) Vide supra, p. 60.

(s) Donne v. Hart, 2 Russ. & My. 360.

(u) Rees v. Keith, 11 Sim. 388.

(w) Crouch v. Martin, 2 Vern. 595; Honnor v. Mortin, 3 Russ. 65.

(r) Carteret v. Paschal, 3 P. Wms. 200.

(t) Bates v. Dandy, 2 Atk. 207.

(v) Ante, p. 61.

the operation upon the wife's rights in her personal property of those acts of the husband, which, either by his own intention or by operation of law, have the effect of assignments.

[*63] **(b) Assignment by Husband of Wife's Choses in Possession.*

With regard to personal property of the wife, presently in possession, over which the common law, and equity by analogy to it, gives the husband absolute power, and which, as has been seen, (x) can be validly assigned, his assignment gives to the assignee a present complete legal and equitable title, not only against the husband himself, but against the wife surviving, whether the assignment have been made with or without consideration. It is not necessary to the efficacy of an assignment by the husband of this species of property, therefore, that the property has not been recovered by the assignee in the lifetime of the husband. The assignment will, nevertheless, bar any right in the wife surviving.

(c) *Assignment of Husband, by Operation of Law, of Wife's Choses in Action presently recoverable—contingent and reversionary.*

With regard, on the other hand, to the property of the wife, resting in obligation and recoverable by action at law, or suit in equity, i. e. her choses en action, as the title of the husband is not perfected until he has reduced the chose into possession, it becomes necessary to consider how far his assignment, whether voluntary or by operation of law, can have the effect of giving a perfect title to the assignee as amounting or being equivalent to a reduction into possession.

First, let us consider the effect in this respect of the assignment of the husband, by operation of law, under the Bankruptcy or Insolvency Acts. The first case upon this subject which it is necessary to notice was *Bosvill v. Brander*, (y) where the chose in question was capable of being immediately [*64] recovered. That case was decided both ways at *different times, first for, and then against, the right of the wife surviving, and only shews the unsettled state of opinion of the judge, Sir J. Jekyll, upon the question. *Pringle v. Hodgson*, (z) where also the chose was presently recoverable, is a decision to the same effect as the later judgment in *Bosvill v. Brander*, viz. that the assignment in bankruptcy of the husband destroys the wife's right by survivorship. Lord Loughborough's words in that case are, "The assignee at law has a right to the chose en action of the wife, and the law reduces it into possession. The bankrupt law gives over all that the husband had or could dispose of to the assignee. The question of survivorship is quite laid aside by the bankruptcy." But Lord Hardwicke, in *Grey v. Kentish*, (a) where the chose en action was reversionary, and Lord Thurlow, in *Gayner v. Wilkinson*, (b) where the chose became recoverable in the lifetime of the husband, had both decided against the assignee in bankruptcy, and in favour of the widow. Thus stood the cases when *Mitford v. Mitford* (c) presented itself for decision. The property in question in that case

(x) Ante, p. 61.

(z) 3 Ves. 316.

(e) 9 Ves. 87. See also *Sherrington v. Yates*, 12 M. & W. 855.

(y) 1 P. Wms. 458.

(a) 1 Atk. 280.

(b) 1 Bro. C. C. 49, n.

was a sum of stock vested in trustees to pay the dividends to C. M. until her death or marriage, and then to transfer the stock to three others; S. M., a married woman, being one of the three. The husband of S. M. became bankrupt, obtained his certificate, and died; the tenant for life survived S. M.'s husband, and subsequently married, by which event the estate for life terminated, and the bequest in remainder fell into possession. The assignees under the bankruptcy of S. M.'s husband then claimed her share of the bequest, as covered by the husband's assignment in the bankruptcy. S. M., on the other hand, claimed it, as never having been reduced into possession in her husband's lifetime. *The question was very fully argued upon the cases which have been mentioned, and, after reviewing them all, Sir W. Grant ordered the stock to be transferred to the widow. His Honor said, where such authorities were opposed to each other, it was necessary to examine the principles on which the decision of the case depended. The assignment from the commissioners, like any other assignment, by operation of law, passed the husband's rights precisely in the same plight and condition as he possessed them. If the assignees came into equity to reduce the interest of the wife into possession, they were bound to make such a settlement as the husband in the same case would have been compelled to make; but, if the assignment had the effect of reducing the interest into possession, that equity could never have prevailed, as no settlement could be compelled out of that of which the husband had obtained possession. But the Court considered the assignment as doing nothing more than placing the assignees in the room of the husband. So far from treating the assignment as equivalent to possession, it was upon the very ground that the assignees wanted its assistance to reduce the property into possession, that the Court imposed on them the condition on which alone it would have assisted the husband to obtain possession. On principle, therefore, and on the authority of *Grey v. Kentish*, and *Gayer v. Wilkinson*, he thought the widow entitled.

In *Mitford v. Mitford*, (d) the vesting of the chose assigned was contingent upon the marriage of the tenant for life, a contingency which did not happen till after the death of the husband of S. M. That case establishes that the contingent or reversionary choses en action of a married woman will survive to her against the assignees in bankruptcy of her husband, should the chose not have ceased to be of a contingent or reversionary nature *by the falling in of the contingency or reversion* during the life of the husband.

*There seems no reason in principle, however, to doubt that the chose en action would equally survive to the wife against the husband's assignees in bankruptcy, although the contingency or reversion should have fallen in before the husband's death, provided the assignee had not actually reduced the chose into possession prior to that event; for there is no contract or agreement, real or implied, between a bankrupt and his assignees, whereon to ground any application of the equitable rule, that, what has been covenanted to be done, equity holds as having been done. All that the bankrupt statutes do, is to transfer to the assignees the right, *tantum et tale*, as it existed in the bankrupt at the period of the bankruptcy;

and all the right that exists in a bankrupt husband at the period of his bankruptcy, in regard to the chose en action of his wife, then contingent or reversionary, is the capacity to reduce it into possession when the contingency or reversion falls in. This capacity not having, in the case supposed, been exercised by the assignees, there is no apparent reason why the same consequences of the omission should not attach to them in favour of the wife, as would have attached to the husband had he continued sui juris. And the decision in *Sherrington v. Yates*(e) confirms this view of the subject.

(d) *Voluntary Assignment by Husband of Wife's Choses en Action presently recoverable.*

Such being the effect of the husband's assignment by operation of law of the wife's choses en action, it still remains to speak of his voluntary assignment of such choses to third parties, where the assignment has been made without or with consideration; and in doing so it will be convenient to treat of choses en action presently recoverable, separately from those which are contingent or reversionary.

[*67] *An assignment of the wife's chose en action presently recoverable, made by the husband *without* any consideration received by him, where the chose is not reduced by the assignee into possession during the life of the husband, will be altogether defeated by the survivorship of the wife. Accordingly, in *Wright v. Rutter*,(f) an assignment by a husband without value of his wife's interest in the residuary estate of a testator, was treated as a nullity against the wife surviving. And the same was held in *Johnson v. Johnson*.(g)

The efficacy of an assignment of the wife's present chose en action, where a valuable consideration for the assignment has been paid to the husband, requires a larger consideration. In arguing *Mitford v. Mitford*, counsel, on the authority of *Carteret v. Paschal*(h) and *Bates v. Dandy*,(i) assumed that an assignment for valuable consideration of the wife's present chose en action, made by the husband, would pass an absolute right to the assignee, wholly freed from her contingent right by survivorship, although the chose should not have been reduced into possession in the husband's life. It was not necessary for the decision of *Mitford v. Mitford* that any opinion should be expressed upon this question. Sir William Grant merely stated the rule as supposed to exist; but he did so, however, in terms which intimated his doubt of the soundness of the assumption; and this doubt he expressed in more unequivocal terms in *White v. St. Barbe*.(k)

In *Carteret v. Paschal*(l) the property in question was a decree in favour of the wife *dum sola*, that she should hold certain lands until reimbursed the amount she had paid for the purchase of a mortgage affecting them.

[*68] This decree she and an after-taken husband had assigned in *trust to pay debts owing by the husband, and the surplus as he should appoint. Lord King, C., held the assignment to be good, upon the ground that the husband and wife were in possession; that the decree was an equitable extent, to be taken as it would be were it a legal extent, in which

(e) 12 M. & W. 863.

(g) 1 J. & W. 479.

(i) 2 Atk. 207.

(l) *Ubi supra*.

(f) 2 Ves. jun. 673.

(h) 3 P. Wms. 197.

(k) 1 Ves. & B. 405.

case the husband alone might have assigned; and that the assignment, therefore, even so far as voluntary, changed the property. On these grounds he preferred the administratrix of the husband to the administratrix of the wife upon the surplus, after payment of the husband's debts. *Bates v. Dandy* was cited before Sir William Grant in *Mitford v. Mitford*, from the inaccurate report of it in Atkyns; but, from the judgment of Lord Hardwicke, which was subsequently published in a note to *Honner v. Mortin*, in 3 Russ. 72, it appears that the property in question, in *Bates v. Dandy*, was two mortgages, one of a term and the other in fee, which an executor had apportioned as the wife's share of a residuary estate, giving an undertaking to assign them as the husband should appoint. The husband and wife accepted of the mortgages upon these terms. Afterwards the husband borrowed money and deposited the mortgages with the lender as a security, and gave a written undertaking to convey them. The husband died without any conveyance having been made to or by him, and the lender filed a bill for a conveyance in terms of the undertaking. Lord Hardwicke held, in regard to the mortgage term, which continued in the executor as trustee, that, if the husband had died without disposing of the trust of the term, it would have survived to the wife; but that what had been done by the husband amounted in equity to an assignment by him. And, in regard to the mortgage in fee, his Lordship held, that, in equity, it was a chose en action, upon the foot of the covenant to pay the money, and, as such, might be assigned by the husband for valuable consideration, so as to bind the wife. He therefore decreed *the assignment to be good for payment of the assignee's debt; but, in regard to the surplus, after making such [*69] payment, he decreed the same to belong to the widow, in preference to the representatives of the husband.

Carteret v. Paschal was not an authority for the rule, in evidence of which it was cited in *Mitford v. Mitford*, viz. that an assignment of a wife's present chose en action, for valuable consideration, passes the right wholly freed from her contingent right by survivorship, without regard to whether the chose had been reduced into possession in the husband's life or not; because in that case the property was not a chose en action, but a chattel, or of the nature of a chattel real, which, as will be seen presently, vested in the husband by the marriage ipso facto, and survived to the wife only in case he did not dispose of it, which in this instance he had done. But *Bates v. Dandy*, or at all events that branch of it which respected the mortgage in fee, is a strong authority for saying that an assignment for value of the present chose en action of a married woman, will transfer the chose to the assignee, so as to defeat the woman's right by survivorship, although the chose should not be reduced into possession in the life of the husband; for Lord Hardwicke seems to have considered that the act of the husband in depositing the mortgage deed with his creditor, and undertaking to convey it to him after it had been apportioned by the executor as his wife's share of the residue and the executor had promised to convey it as the husband should direct, as amounting in equity to a reduction into possession by the husband, so far as regarded that part of the mortgage debt over which the husband had given the creditor a lien by equitable assignment. Accordingly, to that extent, the creditor was preferred, and the surplus only was given to the widow, as not having been reduced into possession. This latter

[*70] branch of *Bates v. Dandy* is subject to the further remark, *that Lord Hardwicke, in observing on *Theobald v. Duffoy*,^(m) where Lord Macclesfield had held, that receipt of the consideration for the assignment of a chose en action was the same as if the money had been received upon the chose, seems to have treated this as equivalent in some way to reduction into possession.

In *Purdew v. Jackson*,⁽ⁿ⁾ Sir Thomas Plumer asked if there was any case in which "the husband, having assigned the wife's present chose en action, and having died before the assignee obtained possession of it, the assignee prevailed over the surviving wife?" and he was answered by the counsel that they believed no such case had occurred. But, in making this answer, they appear to have overlooked that part of *Bates v. Dandy* to which allusion has just been made; for there the creditor (i. e., the assignee of the husband) had not obtained payment of the mortgage debt in the lifetime of the husband, and yet his claim was ordered to be satisfied in preference to the widow's claim by survivorship. The case of *Salisbury v. Newton*^(o) seems also to have been overlooked. There a legacy, to which a married woman was presently entitled, was ordered to be paid to the assignee of the husband after satisfying the wife's equity to a settlement, although neither the husband nor his assignee had done anything to obtain payment of the legacy in the husband's lifetime.

These decisions, in *Bates v. Dandy* and *Salisbury v. Newton*, were very much supported by observations that fell from Lord Lyndhurst in *Honner v. Mortin*,^(p) which, although made obiter in that case, are nevertheless of value, as shewing the opinion of that eminent judge as to what the decision of the Court ought to be in a case to which his observations would be applicable. His Lordship said, that *equity considered the assignment [*71] by the husband as amounting to an agreement that he would reduce the property into possession; it likewise considered what a party had agreed to do as being actually done, and, therefore, *where the husband had the power of reducing the property into possession*, his assignment of the chose en action would be regarded as reduction of it into possession.

The decisions of Lords Hardwicke and Northington in *Bates v. Dandy* and *Salisbury v. Newton*, fortified by this opinion of Lord Lyndhurst in *Honner v. Mortin*, founded as they appear to be in substantial justice, as well as on the rules of equity, might have been considered to settle the question as to the efficacy of an assignment by a husband for valuable consideration of his wife's present chose en action; but they are opposed by two late decisions of Sir L. Shadwell, V. C., and Sir J. Knight Bruce, V. C. in *Ellison v. Elwin* and *Ashby v. Ashby*.

In *Ellison v. Elwin*,^(q) a married woman was entitled under a will to a sum of stock, vested in trustees for payment to her on the death of her mother. After the death of the mother a settlement was executed carrying out articles made while the wife was yet an infant, by which the stock was settled upon the husband and wife for their lives successively, and, on their death, in trust for the children of the marriage. The husband died while the stock was yet standing in the names of the trustees of the will. The widow then claimed it unaffected by the settlement, which, as being exe-

(m) 9 Mod. 102.

(o) 1 Eden, 379.

(p) 3 Russ. 65.

(n) 1 Russ. 1.

(q) 13 Sim. 309.

outed *during coverture*, could not bind her, and, as being a conveyance by her husband of her chose en action not reduced into possession, was ineffectual against her right by survivorship. Sir L. Shadwell said, whether the husband died in the lifetime of the tenant for life, whereby the chose en action *could not*, as against the wife, *be reduced into possession, or whether he survived the tenant for life and died before it [*72] *was* reduced into possession, the same result must follow, and he decreed in favour of the widow against the children. His Honor repeated this judgment in the same circumstances in *Le Vasseur v. Scrutton*.(r)

In *Ashby v. Ashby*,(s) a married woman was entitled, under the will of her father, to a legacy of £80, payable on the death of her mother. The husband and wife, in the lifetime of the mother, assigned the legacy in security of £30 paid to the husband. The mother died, and then the husband died without his having, after the death of the mother, done anything towards obtaining payment of the legacy. The widow claimed the legacy unaffected by the assignment, as void against her; the assignee, on the other hand, claimed the benefit of the assignment on the authority of dicta in *Johnson v. Johnson*,(t) and *Honner v. Mortin*—that where the husband has assigned the chose en action of the wife, and afterwards might have reduced it into possession, equity will hold in favour of the assignee that he has done so. Sir J. Knight Bruce, V. C. said, that *Ellison v. Elwin* warranted him in acting upon his own opinion, which agreed with that decision, and, without entering upon a discussion of decisions and dicta in other cases, he would follow it.

Ellison v. Elwin and *Ashby v. Ashby* leave the question as to the effect of an assignment for the value of the *present* chose en action of a married woman in as unsatisfactory a state as can well be conceived; for in neither of them is the decision of the experienced judge, before whom the case was heard, accompanied with any reasoning to shew upon what it is founded, or the fallacy of the grave authorities by which it is opposed. After considering the effect of an assignment for value of the chose en action of a married woman *not presently recoverable, but contingent or reversionary, some observations will be offered to shew why *Ellison v. Elwin* [*73] and *Ashby v. Ashby* will probably be disregarded as authorities, when the question which occurred in them again arises.

(c) *Voluntary Assignment by Husband of Wife's Contingent or Reversionary Chose en Action.*

Let us now consider the effect upon the wife's right by survivorship of the husband's voluntary assignment for valuable consideration of her contingent or reversionary chose en action, and whether it be necessary, in order to defeat her right, that the chose should have been reduced into possession.

Prior to the case of *Hornsby v. Lee*, which will be noticed presently, there was no direct decision upon the effect of such an assignment, with the exception of that in *Atkyns v. Dawbury*.(u) In that case, the assignment was declared to be binding on the wife's right; but "it seems," says Mr.

(r) 14 Sim. 116.
(t) 1 Jac. & W. 479.

(s) 1 Coll. 553.
(u) Gilb. Eq. R. 88.

Jacob,(v) "not to have been considered as the case of a reversionary interest;" and so far as the decision turned on the effect of the assignment alone, the report of the case shews that the assignment was made without valuable consideration. Dicta of Lord King, in *Chandos v. Talbot*;(w) of Lord Hardwicke, in *Grey v. Kentish*(x) and in *Hawkins v. Obyn*,(y) were considered to support the decision in *Atkyns v. Dawbury*, even on the supposition of the question arising with an assignee for valuable consideration.

Such was the state of the question when it presented itself for decision in *Hornsby v. Lee*,(z) where it arose between the widow and an assignee for valuable consideration. The husband and wife had joined in assigning [*74] her *contingent* *reversionary interest in a sum of stock, vested in trustees to pay the dividends to her mother for her life, and to divide the stock among the children of the mother, who should be living at her death; the husband died, and then the mother; and a competition arose between the widow and the husband's assignee for the widow's share of the stock. Sir Thomas Plumer found that the widow was entitled to the fund. This decision excited much interest in the profession, and was supposed not to have been made in a manner which entitled it to much weight.

Eight years afterwards the question again occurred in *Purdew v. Jackson*.(a) There the wife had a *vested* reversionary interest in a sum of stock standing to the credit of a cause for administration of a testator's estate upon the trusts of his will, her interest being expectant on the death of a tenant for life. The wife and her husband joined in assigning her share of the fund to a purchaser, who procured what is technically called a stop order to be made in the cause; i. e. an order directing the fund not to be paid over without notice to him; the husband afterwards died, and then the tenant for life. The purchaser and the widow presented their respective petitions for payment of the fund. Sir Thomas Plumer, M. R., had the case twice argued before him, and took time to consider his judgment, and then ordered the fund to be paid to the widow. His Honor, after reviewing all the authorities supposed to bear upon the question, and observing that there were none directly upon the point raised, with the exception of *Hornsby v. Lee*, and, saying that he would consider the question as if that case did not exist, observed that marriage was only a qualified gift to the husband of the wife's choses en action, viz. that he reduced them into possession during its continuance; the wife's right was not divested by the marriage; the [*75] chose en *action continued to belong to her, unless the husband could and did reduce it into possession, and thereby made it cease to be a chose en action. Here the husband died, before he did, or could, perform the condition on which he was to acquire the property. If he could not perform such condition, how could his assignment have such effect? could the assignment of a *future right of action* give a *present right of possession*? by changing hands, could that which was a *contingent and future right of action* become an *absolute and immediate right of possession*? Though the assignment might give a *better* interest than the assignor had, it could not pass a *different* right from that which was in him,

(v) 2 Rop., Husb. & Wife, 511.

(x) 1 Atk. 280.

(a) 1 Russ. 1.

(y) 2 Atk. 551.

(w) 2 P. Wms. 608.

(z) 2 Madd. 16.

or change the *nature* of the thing assigned. To call the assignment a constructive reduction into possession, was to suppose two things to be the same which were directly opposite to each other; it was to suppose a chose en action to be a thing constructively reduced into possession; it could not be both. It was said, the husband substantially possessed the fund, by receiving the consideration money for the assignment; but that consideration was paid merely for a contingent right to reduce the thing into possession, when the tenant for life died. His Honor concluded his judgment in these terms: "I continue to be of opinion, that all assignments made by the husband of the wife's outstanding personal chattel, which is not or cannot be reduced into possession, whether the assignment be in bankruptcy, or under the Insolvent Act, or to trustees, for the payment of debts, or to a purchaser for valuable consideration, pass only the interest which the husband has, subject to the wife's legal right by survivorship."

The next case upon the subject was *Honner v. Mortin*.^(b) There the wife had a vested interest in remainder, in the residuary estate of a testator, expectant on the death of a tenant for life. She and her husband joined in assigning her interest in a sum of stock, part of the estate, [*76] to a purchaser for value. The husband died before the residuary estate fell into possession. The decision in *Purdew v. Jackson* was made in February, and in the following month of May the widow filed her bill, praying that the fund assigned might be ordered to be transferred to her. In this she was opposed by the assignee, on the authority of the same cases as had been relied on by the assignee in *Purdew v. Jackson*. Lord Lyndhurst, C., decreed the transfer prayed for by the bill. After commenting on all the authorities, his Lordship said there was no one distinct decision at variance with the judgment of Sir Thomas Plumer; and if some dicta could be cited against it, these were opposed by conflicting dicta, and he concluded thus: "After considering the question in all its bearings, and the authorities and principles on the one side and on the other, these are the reasons which lead me to the conclusion, that the judgment of the Master of the Rolls, in *Purdew v. Jackson*, was right, and that the husband, dying while the wife's interest continued reversionary, has no power to make an assignment of property of this description, which shall be valid against the wife surviving."

In *Watson v. Dennis*,^(a) which was a case precisely similar to *Honner v. Mortin*, and argued at the same time, Sir J. Leach, M. R., expressed his full assent to the doctrine established by *Purdew v. Jackson*, and *Honner v. Mortin*.

These cases have conclusively established, that *where it has not been possible* for the husband's assignee of the wife's contingent or reversionary chose en action to reduce the chose into possession before the husband's death, from the circumstance of the event, upon the happening of which *the right would have become one in possession, not having occurred before the husband's death, the wife's right by survivorship will [*77] prevail over the assignee's right under his conveyance; and that, neither the fact of the husband having made the assignment, nor of his having received the value of the chose as a consideration for the assignment, will

(b) 3 Russ. 64.

(c) 3 Russ. 90.

operate as a virtual reduction by him into possession, so as to defeat the right by survivorship. Accordingly, in *Scott v. Davis*,^(d) Lord Cottenham set aside a sale by husband and wife of annuities settled to the separate use of the wife for life, and after her death as she should by *will* appoint, on the ground that whatever power the wife had to dispose of the annuities to accrue during her own life, she had none to depart with her right to dispose, by *will* or revocable instrument, of those which might accrue after her death.

But it is obvious, that where the chose *could by possibility have been reduced into possession* in the husband's lifetime, either by himself, or by his assignee, from the circumstance of the chose having been originally one presently recoverable, or having become presently recoverable by the falling in of the contingency or reversion in the husband's lifetime, where it was in its origin contingent or reversionary, there is room for application of the reasoning suggested by Lord Lyndhurst in *Honner v. Mortin*, which has been already noticed,^(e) viz. that equity considers the assignment by the husband as amounting to an agreement that he would reduce the property into possession, and that what a party had agreed to do was actually done; and therefore, where the husband had the power of reducing the property into possession, his assignment would be regarded as reduction of it into possession, so as to defeat the wife's right by survivorship.

[*78] If this reasoning be correct, the cases of *Purdew v. Jackson*, **Honner v. Mortin*, and *Watson v. Dennis*, which establish that the wife's right by survivorship *must* prevail over the right of the assignee from the husband, where in the circumstances the possibility *never did* exist of reducing the chose en action into possession, so as to give admission to any implied reduction into possession by the effect of the assignment, are no way inconsistent, but are in perfect harmony, with *Bates v. Dandy*, *Salisbury v. Newton*, and the observations of Lord Lyndhurst in *Honner v. Mortin*, that the wife's right by survivorship will *not* prevail over the right of the assignee from her husband, where the possibility of reducing the chose into possession during the coverture *did* exist, so as to give admission to implied reduction into possession by the effect of the assignment.

While *Bates v. Dandy*, and *Salisbury v. Newton*, do not conflict with the other cases, to which reference has been made, they seem to be founded on substantial justice; for the obvious meaning of the husband's assignment is, that he will do everything, reduction into possession included, which may be necessary to give the assignee a perfect title to that which the assignee has expressly covenanted to obtain from him, viz. the particular chose en action for which he has paid a consideration, either actually commensurate, or which the husband has agreed to consider as commensurate to the value of the chose; and as the husband may, as against the wife, reduce the chose into possession, and assign it, it would seem to be the natural, rather than an implied, construction of the assignment, that it embraces a covenant by the husband to reduce the chose into possession as soon as possible. Giving effect, therefore, to that implied covenant, where the circumstances admit

(d) 4 My. & Cr. 87.

(e) *Anta*, p. 71.

of the possibility of its application, is consistent with reason and justice, as well as with the artificial rules of equity. On the other hand, it does not do any violence either to these principles, or to these rules, to refuse to *give effect to such implied covenant, where the circumstances do [*79] not admit of the possibility of the application of an express covenant, and still less of an implied one.

But it is very difficult to discover the principle, which in *Ellison v. Elwin*, and *Ashby v. Ashby*, treated the cases where it was *possible* to reduce the chose into possession, and that in which it was *impossible* to do so, as both alike, and, on that account, declared that in neither could the assignment defeat the wife's right by survivorship.

Upon a review of all the cases, they establish this general position, that, as to the wife's choses en action, whether presently recoverable, contingent or reversionary, the right of the husband, and of his assignee, are both subject to the same condition for their perfection, viz. reduction of the chose into actual possession during the life of the husband, if the wife survive him. That in this way alone can the wife's right to take the chose, upon the husband's death, be defeated. And that neither the husband's assignment by operation of law, as in bankruptcy or insolvency, nor his voluntary assignment, whether with or without consideration, makes any change in this respect, because of any express or presumed intention in the husband thereby to exercise a right of property in the chose, by transferring it to another, which might ground an argument for implied reduction into possession; since nothing short of actual reduction by the husband or his assignee will defeat the widow's right by survivorship. But that, where the assignment has been made for valuable consideration, received by the husband, and it has been possible for the husband or the assignee to reduce the chose into possession during the coverture, equity implies reduction into possession, in favour of the assignee, unless in so far as this latter position is contradicted by the decisions in *Ellison v. Elwin*, and *Ashby v. Ashby*, opposed as they are by *Bates v. Dandy*, *Salisbury v. Newton*, and the dictum of Lord Lyndhurst in *Honner v. Mortin*.

(f) *Effect of the Wife's Consent in Court upon Husband's Assignment of her Reversionary or Contingent Chose en Action.*

*As an assignment then by the husband of the wife's reversionary or contingent chose en action does not vest the chose in the assignee, [*80] so as to defeat the wife's right by survivorship, unless the right becomes one in possession during the coverture, and the release of the husband has not the effect of defeating the right by survivorship, as will be seen presently, can this defect in the title of the assignee be cured by taking the consent in court of the wife to the husband's assignment? Roper(e) having previously expressed his own opinion that an assignment by the husband *for value* of his wife's chose en action, whether immediately recoverable or in remainder or expectancy, would be binding against her right by survivorship, strains hard to reconcile the cases upon the question where the wife will be permitted to consent in court to the disposal of her personal pro-

perty; and he comes to the conclusion, that the discordance in the adjudications upon the subject may be attributed to want of attention to what he considers the true principle, viz. that the consent should be received only where the assignment is *for value* "by way of confirmation, and to waive her title to a settlement;" but that where the assignment is *without value*, and the consent is offered to pass the reversionary interest in analogy to a fine at common law, the Court should decline to receive the consent.

The cases cited by Roper shew that an assignment *without value* will be a nullity as against the wife surviving. Her consent in court might by possibility, therefore, help such an assignment, so as to make it valid; but if an [*81] assignment *for value* was good per se, as in Roper's opinion *it was, but erroneously, as has been shewn, (f) it is difficult to see how the consent of the wife could any how help this kind of assignment. If it was good at all, it was so because of the right in the husband, and no consent of the wife, "by way of confirmation," could make it better; and supposing such right to be in the husband, there was no equity in the wife to a settlement, which her consent could be considered to waive. But since Roper wrote, the cases, as already shewn, have established that an assignment *for value* of the wife's reversionary chose en action, continuing such throughout the coverture, will be no more effectual against the wife surviving than an assignment *without value*. If, therefore, the cases with regard to the wife's consent in court to the husband's assignment of her reversionary property are to be reconciled, it must be through some other medium than the distinction to which that learned writer points. But, in truth, they are not reconcilable, as the history of them will shew. This, however, will not create any difficulty in ascertaining what the law upon the subject is at this day.

The first case, *Butler v. Duncombe*, (g) is reported so unsatisfactorily, that little use can be made of it. The next, *O'Keate v. Calthorpe*, is not reported, but is mentioned by Lord Eldon in *Sperling v. Rochfort*. (h) There South Sea Annuities were, by articles upon marriage, vested in trustees to permit the wife to receive the profits to her separate use; and, if she should survive, to transfer the whole to her; if she should die in the husband's life, to transfer according to her appointment by deed or will, and in default of appointment to the issue; and, if there should not be any issue, to the husband and the brother of the wife in moieties. A bill was filed to have some of the fund applied as the wife should appoint; but Lord Hardwicke [*82] *said, "There was no ground to break in upon the marriage agreement and take away the interest. If the wife had any power over the principal, let her make an appointment, and he would consider the effect of it; but he would not interpose upon her coming into Court." The next case was *Fraser v. Baillie*. (i) There the Court also refused to receive the consent of a married woman, which was tendered to support a deed making an immediate exercise of a power of appointment, in favour of her son, of part of a fund in which she had a life estate, after a life estate in her husband; with a power to her to appoint in favour of her children; and the

(f) Ante, p. 76.
(h) 8 Ves. 177.

(g) 2 Vern. 760.
(i) 1 Bro. C. C. 517.

refusal appears to have been grounded upon the injury to the life estate of the wife, in case she should survive her husband.

In the cases which have been noticed, the Court *refused* to take the wife's consent; but in *M'Carmick v. Buller*,^(k) Sir L. Kenyon, M. R., after examination of the wife, and observing, apparently in ignorance of those cases, that the case was one without precedent, decreed payment to the husband of a sum settled upon him for life, after his death upon the wife for life, and after the death of the survivor upon such persons as the survivor should appoint. In *Ellis v. Atkinson*,^(l) Lord Thurlow, after examining the wife, decreed to the husband payment of a fund settled on marriage to the separate use of the wife during the lives of herself and her husband, and over which the wife had a power of appointment, in case she predeceased her husband, and an absolute right in case she survived him. It seems questionable, however, whether this case lends the weight of Lord Thurlow's name to the doctrine it supports; for his Lordship doubted, when the case was heard, whether the Court could take the wife's consent, but nevertheless took it, desiring that the effect might be considered; *and his Lordship's judgment was not delivered till three years afterwards, on the [*83] eve of his going out of office, and when, possibly, he had forgotten why the consent had been taken; and then his judgment was not delivered in Court, where any misapprehension could have been set right, but was sent to the registrar's office in writing. In *Guise v. Small*,^(m) also, the Court of Exchequer, after examination of a married woman, established a deed made by her and her husband to a creditor of the husband, whereby they conveyed to the creditor her interest in a fund settled upon the husband and her successively for life, remainder to their children, as they or the survivor should appoint; and, in default of issue, according to her appointment, as to part, by deed or will; as to other part, to the husband; and, as to the residue, to the husband for life, and then as she should appoint by deed or will.

In *Sockett v. Wray*,⁽ⁿ⁾ the Court seems to have reverted to the view taken in *O'Keate v. Calthorpe* and *Fraser v. Baillie*, as to the incompetency of taking the wife's consent. There, money was vested in trustees to pay the interest to the wife, during her life, to her separate use, and after her death, for such persons as she should by will appoint, and, in default of appointment, for her executors and administrators. Upon a bill, filed by the husband and wife against the trustees to compel a transfer of the fund to the husband upon her consent in court, Lord Alvanley refused to make the decree asked, as the wife had no power to dispose of the fund otherwise than by a will or revocable act.

Two cases then occurred, *Richards v. Chambers* and *Seaman v. Duill*,^(o) which were heard together. In the first, property was settled in trust for the separate use of the wife for life, to be absolutely hers if she survived the husband; and, if she died in his life, to go to such persons *as she should by deed or will appoint, and, in default, to her executors and [*84] administrators. In the second case, the property was settled upon the husband for life, and, if he survived his wife, to him absolutely; and, if she

(k) 1 Cox, 357.

(n) 4 Bro. C. C. 483.

(l) 3 Bro. C. C. 565.

(o) 10 Ves. 580.

(m) 1 Anat. 277.

survived him, to her absolutely. In the first case, the wife executed the power of appointment in favour of the husband; and in both cases the husband and wife petitioned the Court that the money might be paid to the husband. Sir W. Grant, M. R., said, that, in the first case, the wife might part with her separate estate and make the appointment, which, in the event of her predecease, would be a good disposition; "but," he continued, "the question as to both cases was, whether the contingent interest which the wife, while *sui juris*, had secured to herself in the event of her surviving, could, through the interposition of the Court, be given up by her while in a state of coverture?" His Honor then reviewed the previous cases, observing that nothing was preserved to shew the principle upon which the decree in *M'Carmick v. Buller* had been made; that apparently the contingent interest in the wife, which could not be the subject of the appointment, had been overlooked in *Ellis v. Atkinson*; and that he could not comprehend the ground of *Guise v. Small*. His Honor then remarked upon the difference between the case before him and that where the husband is entitled to the trust property, subject to make a provision for the wife before he reduces it into possession. There, when the wife relinquishes that equity, the marital right is allowed to operate unobstructed by the equity, which the wife does not oppose to it; but here, there was no pretence of right on the part of the husband. As to the contingent interest, there was no power of disposition in the wife; on the contrary, the non-existence of such power was the ground for calling upon the Court; and his Honor concluded thus:—"As my opinion is, that there is no right in the husband to [*85] call *for, or power in the wife to make, a transfer, I cannot comply with either of these applications." This judgment was followed by Sir E. Sugden, C., in nearly similar circumstances, in *Batt v. Cuthbertson*.(p)

In *Woollands v. Croucher*,(q) a married woman had a vested reversionary interest under a will in residuary estate, which she and her husband contracted to sell; and the object of the suit was specific performance of this contract, as the purchaser had refused to complete it without the consent of the wife expressed in court. Sir W. Grant, after repeating the observations he had made in *Richards v. Chambers*, said, "If the husband has a right to convey, let him exercise his right; but why this Court should join and aid him for this purpose, I do not know." Ultimately his Honor took the wife's consent, but only *de bene esse*, and because of its being stated to have been done by Lord Alvanley under the same will; and he added this observation, "The only question is, whether the Court will by anticipation, taking the wife's consent, preclude the question that may arise upon it." What his Honor meant by taking the consent *de bene esse* and by the observation just quoted, is not very apparent.

In *Pickard v. Roberts*,(r) the husband and wife petitioned, along with the mother of the wife, that a fund, in which the mother had a life interest under a will, and which was payable over after her death to the wife, might be paid to the husband. Sir J. Leach, V. C., said:—"A wife, by her consent in court, can only depart with that interest, which is the creature of a

(p) 4 D. & W. 392. See also *Hansen v. Miller*, 8 Jur. 209.

(q) 12 Ves. 174.

(r) 3 Madd. 384.

Court of equity; viz. the right which she has to claim a provision, by way of settlement, out of that property which the husband at law would take in possession in her right. Her equity arises upon his legal right to *present* possession. This principle has no *application to a remainder or reversion. When the remainder or reversion falls into possession, [*86] then the equity arises. A Court of equity interferes to protect the property of the wife against the legal rights of the husband; and will never lend itself as an instrument to enable the husband to acquire a right in the wife's personal property which he can by no means acquire at law."

The same result followed in *Ritchie v. Broadbent*,^(s) where the interest was an absolute right in the wife, under a will, to a sum of stock, contingent upon her surviving her husband.

The last case upon the subject, *Box v. Box*,^(t) occurred in Ireland. There, money was standing to the credit of a cause, in trust, to pay the interest to the mother of three daughters, and, upon her death, to divide it equally among the daughters, one of whom was a married woman. A motion was made in the cause to have an arrangement, by which the three daughters, with the husband of the married one, consented that the capital of the fund should be paid over to their mother, made a rule of court. The Master of the Rolls refused the motion, which was then made by appeal to Sir E. Sugden, C., who at first intimated an inclination to grant it; but, being unwilling to do so in opposition to the opinion of the Master of the Rolls, he ordered the motion to be argued before himself and that judge. The question was accordingly re-argued, and, after hearing an elaborate opinion from the Master of the Rolls, Sir E. Sugden went through all the cases which have been mentioned, and concluded by affirming the refusal of the motion.

In the result the decisions establish that *McCormack v. Buller*, *Ellis v. Atkinson*, and *Guise v. Small* were either ill decided, or proceeded upon specialties which do not appear from the reports; and that, where a married woman has a *contingent or reversionary interest, which either cannot or may not fall into possession during the coverture, the [*87] Court will not accept her consent to depart with it; and will not, as to this, make any exception from the rule, that, as a feme coverte, she is incapable of dealing with her property, present or contingent, and will only take her consent to renounce that equity, which the Court itself has given her, viz. to require a settlement where there is a present right in the husband to take possession of her property. Indeed, this doctrine was carried so far in *Breton v. Clifden*,^(u) that the Court refused to give effect to a partial appointment by a husband out of a fund, which formed the security for an annuity payable to the wife after his death, the capital sum being £10,500, £4 per Cent. Stock, and the annuity only £200, although the wife had consented to the appointment; the refusal of the Court being grounded on the prejudice which the wife's reversionary life estate might suffer by the diminution of the fund for its satisfaction. And in *Frank v. Frank*,^(v) where the question arose upon a deed by which a married woman released her jointure out of lands, and accepted a sum for maintenance during the life of

(s) 2 J. & W. 456.

(u) 1 Sim. & S. 363.

(t) 1 Dru. 42.

(v) 3 My. & Cr. 171.

her husband, a lunatic, Lord Cottenham said: "If, instead of land, it had been money, the Court would not have allowed her by any act of hers, during the coverture, to bind her right to a reversionary interest of that description. Without her consent, the Court would not have dealt with it or disposed of it at all; and her consent the Court would have refused to take."

It will be observed, that in some of the cases just noticed, the question arose in regard to money which had formed the subject of settlement prior to marriage, while in others it was in regard to money the property of third parties; but this did not occasion any distinction in principle in the decision [*88] of the two classes of cases; it only called forth the observation as to the first, that, whatever power the wife might, prior to marriage, have had over the fund, she had none after it, except so far as reserved by the settlement. The effect of this was to show, that, as well as to money which was her own originally, as to money which was the gift of strangers, she was equally incapable of giving her consent to depart with her reversionary interest in it.

But it is material to observe another distinction in the cases. In those which arose upon money, the subject of settlement prior to marriage, the contingency upon the happening of which the right of the wife was to emerge, was the death of the husband, and was one, therefore, which *could not* by possibility happen during the coverture; whereas in those cases which arose upon money the subject of legacy from strangers, as in *Pickard v. Roberts* and *Box v. Box*, the contingency was no way dependent upon the husband's life, and might well have happened during the coverture. Yet the decision was the same in both classes of cases.

It may be remarked here, that, even if the case be one in which the consent of the wife is receivable upon the principles which have been stated, the Court will not receive it while the fund, as to which it is offered, has not as yet been ascertained.(w)

(g) *Effect, upon Husband's Assignment of the Wife's Reversionary Chose en Action, of his obtaining a Release of the Estate prior to the Wife's Estate.*

In all the cases which have been mentioned, in regard to the power of a wife to dispose of her reversionary interest during the coverture, with the exception of *Pickard v. Roberts* and *Box v. Box*, the vesting of the [*89] right in possession depended upon the wife surviving the husband, so that the vesting in possession could not take place during the coverture. In *Pickard v. Roberts* and *Box v. Box*, the vesting depended upon the wife's surviving a third party, and therefore might have occurred during the coverture. After these cases had been disposed of, an expedient was fallen upon, for getting the better of their effect, by obtaining a release of his interest from the party holding the intermediate estate, and upon whose death the vesting in possession depended, so as to make that a *present chose en action* which in its origin was *reversionary*, then taking an assignment from the wife, and afterwards asking the Court to receive her consent to the

(w) *Edmonds v. Townsend*, 1 Anst. 93; *Sperling v. Rochfort*, 8 Ves. 180.

transaction. In *Creed v. Perry*,^(x) and *Hall v. Hugonin*,^(y) Sir L. Shadwell, V. C., gave effect to such a transaction by receiving the consent of the wife to payment to her husband, after a release of a life estate prior to her reversionary estate had been obtained from the party in right of it. And the same judge followed the same course in *Bishop v. Colebrook*,^(z) where the question arose upon a surrender to the wife of a life estate in the husband, by a purchaser of that estate under the bankruptcy of the husband. His Honor said, that, by the surrender of the life estate to the wife, the whole interest was in her to deal with it as freely as if it had originally been given to her absolutely.

It would seem, therefore, according to the authority of these cases, if they are to be assented to, that the vesting in possession of the reversionary interest of the wife, if it can be accomplished during the coverture, will support an assignment of the fund by the wife, upon her waiving, by consent in court, her equity to a settlement out of it. But it must be obvious, that this suggests a very easy expedient for defeating that jurisdiction which Courts of equity have asserted of protecting the property of married women from *the influence of their husbands; for the transaction, although upon the face of it appearing to be for the benefit of the [*90] wife, by enlarging her estate or bringing it immediately into possession, is in truth but a contrivance to convert the property into that nature which will enable the husband to take it from her, as having become his *jure mariti*, and this through the assistance of the Court itself. *Doswell v. Earle*^(a) was relied upon in *Hall v. Hugonin*, as an authority for the course which the Court was asked to take; but in that case the wife, after the death of her husband, adopted the transaction which had taken place with him, by allowing the interest upon the fund in question to be paid to the tenant for life by her husband's executors during a course of no less than eight years. *Doswell v. Earle*, therefore, seems a very questionable authority, if it is any at all, for the doctrine which *Creed v. Perry* and *Hall v. Hugonin* go to establish.

But these cases were followed by *Whittle v. Henning*,^(b) where money was settled in trust for the husband for life, then for the wife for life, with remainder to the issue of the marriage (of which there was one son) as the husband and wife should by deed appoint. The husband and wife made an appointment in favour of the son, who then, along with his father, executed a deed by which he relinquished his interest in favour of the mother, and directed the money to be paid to her, to the end that his interest might be merged and extinguished in hers; and the father, with the same view, assigned and surrendered his life interest. A petition was then presented to the Court by the husband, wife, and son, praying that the fund might be transferred to the son for his absolute use; but Lord Langdale, M. R., refused to make any order upon the petition, although *Hall v. Hugonin*, *Creed v. Perry*, and *Bishop v. Colebrooke* were all cited to him; but his Lordship did not give, so far as the report *shews, the reasons for his refusal. The case has since been carried before Lord Cotten- [*91] ham, C., who, it is understood, expressed an opinion in favour of the view

(x) 14 Sim. 592.

(a) 12 Ves. 473.

(y) Id. 595.

(b) 12 Jur. 298; 17 L. J., Chanc., 151.

(z) 11 Jur. 793.

which had been taken of it by the Master of the Rolls. The possibility, therefore, of converting the wife's reversionary chose en action into one in possession, by the release of prior estates, so as to facilitate her assignment of it, may still be considered as an open question, and one very doubtful.

Since the foregoing was written, Lord Cottenham has given his judgment in *Whittle v. Henning*. His Lordship said, that whatever interest the wife could derive under the husband's assignment must terminate with the coverture, as it was of the husband's life interest. To this the husband would become immediately entitled, or rather his interest would remain the same, though under a different title. It would be strange, then, if the machinery which had been resorted to should deprive the wife of her future life interest, and the Court of the power of the exercise of its jurisdiction for her protection. For this purpose, the Court disregards the abstract rights of the husband, and refuses to assist him to possess himself of property to which, *jure mariti*, he is entitled, without his doing what it thinks right in providing for the wife. If he was correct in the opinion which he gave in *Stiffe v. Everett*,^(c) that the present life interest of the wife fell within the rule as to reversionary interests, because all the payments to her, subsequent to the coverture, would prove to be reversionary, it was clear, that, if, from the commencement, the wife had had a life interest, it would be unattainable by the husband, except as to what might accrue during the coverture. And the position of the parties here was the same; the husband in his own right was entitled to all the dividends during the coverture; on his death, the title to them was in the wife. In either case the Court would [*92] not allow the husband to deprive his wife of her reversionary interest. It was said, that the wife had a present absolute title to the whole. This, however, assumed that her reversionary life interest no longer existed, but was merged in the interests given to her. This could only be if the Court, following the rules of law, allowed an equitable merger for the sole purpose of depriving the wife of its protection, or permitted a supposed analogy to the rules of law to defeat the rules and practice of Courts of equity, although in other instances it disregards the rules of law and the rights of husbands when they interfere with such rules and practice. Equity would consider her interest as still reversionary, notwithstanding the parties, for the purpose of depriving her of such reversionary interest, might have endeavoured to unite in her person all the other interests in it. In *Hall v. Hugonin*, the Vice-Chancellor said, that he did not treat the case as one of merger; but in no other way could the object of the parties be advanced. If there was no merger, the life interest of the wife remained as before, and fell within the decisions of *Purdew v. Jackson* and *Honor v. Mortin*. There could not be a legal merger; and, if there could, equity would not permit it to defeat equitable estates and interests: *Thorn v. Newman*,^(d) *Nurse v. Yerworth*.^(e) After commenting upon the cases which have been mentioned, his Lordship dismissed the petition.

Whittle v. Henning may be considered as overruling *Hall v. Hugonin* and the two cases which followed it, and as establishing, that, whatever may be the ultimate effect, upon the rights of a married woman, of assigning to her estates prior to her reversionary interest, the Court will not lend

(c) 1 My. & Cr. 37.

(d) 3 Swanst. 603.

(e) Id. 608.

its aid to working out in this way the device of merging the prior estates in her reversionary estate, so as to make her interest one in possession, and thereby pave the way to her assignment of her reversionary estate during the coverture.

***§ 4.—Release by Husband of Wife's Reversionary or Contingent Chose en Action. [*93]**

The act of the husband, in transferring the chose en action of the wife to third parties, being powerless to defeat the widow's right by survivorship to her choses en action, unless perfected by subsequent actual or implied reduction into possession by the assignee during the life of the husband, although the act of transference is as full an exercise of a right of property as can well be conceived, the inquiry is naturally suggested, whether a *release* of the chose, made by the husband, can defeat the right by survivorship?

With regard to the chose en action of the wife, presently recoverable, as equity gives the husband power to dispose of it by assignment, it does not require authority to shew that the release of the husband to the debtor would be equally effectual; since the husband by suing for and recovering the chose reduces it into possession, and makes it his own, and, consequently, might immediately afterwards re-deliver it to the party from whom he recovered; so his releasing the chose at once is only arriving at the same end by a shorter road. It is said in Touchstone,^(f) "A man may discharge anything due, or any wrong done to his wife, before or after the marriage, [so as]" introduces the editor into the text, "[the same duty may happen during coverture];" and in the same place, "If any wrong be done, or statute, promise, or obligation made to my wife alone, or to her and me together, at any time during the marriage, I alone may release or discharge this;" so a release by a husband of a legacy, presently payable to his wife, was sustained, although the wife had been divorced **causâ adultærii*,^(g) because such divorce operated only separation à mensâ et thoro. And in Chamberlain v. Hewson,^(h) a release, by a husband to his paramour, of the costs of an ecclesiastical suit by the wife against the paramour for adultery, decreed to be paid to the wife, was sustained, to bar further proceedings against the paramour for payment of the costs.

With regard, however, to the choses en action of the wife, which are contingent or reversionary, a distinction must be observed, whether the right is vested or contingent; and, if contingent, whether the contingency is such as can by possibility arise during the coverture, or is such as must necessarily occur after its termination. If the right is vested, but reversionary, and the reversion may and does fall in during the coverture, or if it is contingent upon an event which may and does happen during the coverture, the husband, by releasing it, has exercised the utmost power over

(f) Preston's Edit. p. 333.

(g) Stephens v. Totty, Cro. Eliz. 908; Moore, 665.

(h) 1 Salk. 115.

the chose; there is nothing intervening to prevent the operation of the release, nor is there any reason why it should not have effect. But that cannot be said where the reversion cannot or does not fall in, or where the contingency cannot or does not happen, during the coverture. No doubt in one case,⁽ⁱ⁾ where the right was vested, and merely the period of payment postponed, the release of the husband of this vested right was held to be effectual, though made before the period of payment, and although that did not arrive in the life of the wife. In that case the question was in regard to a legacy, payable eighteen months after the death of the testator to a married woman who predeceased her husband. The Court held, that the legacy belonged to the husband surviving, because he had "an interest in the legacy before the time of payment arrives, which interest it is clear that [*95] *he might have released, previously to the period of the money becoming payable." But the case is subject to this observation, that the wife had predeceased the husband; and further, that the words which have been quoted may be sound law, and yet the release of the husband be void, as against the wife surviving; all the interest he has, until the chose in action is reduced into possession, is, as was before observed, the right to do so. Such right he may of course release; but it is altogether a different question, whether he can likewise release the right of the wife to take the chose, in case it shall not have been reduced into possession, from the right being dependent on a contingency, which either did not arise during the coverture, or could not arise until after its termination. Accordingly, in *Belcher v. Hudson*,^(k) the defendant promised, that, if the plaintiff would marry a certain man, he, the defendant, would pay her an annuity. The plaintiff married the man, and, after his death, brought action for payment of the annuity. The defendant pleaded a release by the husband, during the coverture, of all actions or demands which he had or might have, &c.; but his plea was disallowed upon demurrer, for, being a promise to perform a payment after the death of the husband, it was not in demand during his life, nor by any possibility could be demanded from him. In *Cage v. Acton*,^(l) the question was in regard to the right of the wife, as executrix of her husband, to retain the amount of a bond given by the husband to her before marriage, conditioned to be payable in case he should predecease her, and not leave her a sum certain. Holt, C. J., who against the opinions of Gould and Turton, JJ., held the bond to have been extinguished by the marriage, said nevertheless, having in view probably the case of *Belcher v. Hudson*: "If a stranger promised to a woman, that, in consideration she would marry such a man, he would pay her. *so [*96] much; if she survive her husband, the husband could not have released this promise, because nothing could become due during the coverture; but when the wife has a duty, which may become due during the coverture, the husband may discharge it, according to *Lampet's case*." And in *Thompson v. Butler*,^(m) it was decided that a husband could not release an annuity, payable to the wife for her life, if she survived him. Nevertheless, it must be admitted, that, in *Hore v. Becher*,⁽ⁿ⁾ Sir L. Shadwell, V. C., sustained a release by a husband of a bond which had been

(i) 2 Roll. Abr. 134.

(l) 1 Raym. 515.

(n) 12 Sim. 465.

(k) Cro. Jac. 222.

(m) Moore, 522.

given to the wife by a third party, before marriage, for payment of an annuity for her life, as effectual to discharge not only the payments which had accrued during the coverture, but those which should accrue after its expiration, by the death of the husband. No reason was assigned for this judgment, further than that the husband may release a bond or note given to a woman *dum sola*; "and if he release the security, there is an end of the annuity." It seems difficult to reconcile this either with principle or authority; and notwithstanding this decision by so experienced a judge, it may be considered as safe doctrine, that a release by the husband of the wife's reversionary or contingent chose en action will not defeat the wife's right to it by survivorship, in case the reversion does not fall in or the contingency happen during the coverture.

§ 5.—*Effect of Proceedings at Law or in Equity, or under Submission to Arbitration, in reducing the Wife's Choses en Action into Possession.*

(a) *Action at Law.*

In order that the reader may apprehend this subject, it will be proper to premise a few observations as to those *actions in which the wife [*97] may or may not be joined with the husband.

In respect of all personal estate en action, the right to which has accrued to the wife, or to the husband jointly with her during the marriage,(o) and of all personal contracts or covenants made with the wife, or with the husband jointly with her *during* the marriage, the husband, as he may disagree to his wife's interest in them, and make his own right absolute, may institute actions at law upon them in his own name alone.(p) Upon a bond, therefore, given to husband and wife, the husband alone may bring action for its payment;(q) and the same observation applies to a promissory note given to the wife alone during coverture.(r) On the other hand, if the wife be the meritorious cause of action, as it is called, the husband may, if he choose, join her with him in the action.(s) Thus, in an action upon a covenant with husband and wife to grind at the mills of the wife, the wife was held to be well joined with the husband as co-plaintiff;(t) and so also in an action upon a promissory note granted to the wife alone,(u) and in actions upon contracts, where the services of the wife were the consideration.(v) In these cases, however, the promise must have been made to the wife,(w) and the declaration must shew the interest in her, in respect of which she is joined in the action.(x) If the consideration were paid by the wife alone, she can-

(o) *Palmer v. Trevor*, 1 Vern. 261; *Stephens v. Totty*, Cro. Eliz. 908.

(p) *Beaver v. Lane*, 2 Mod. 217; *Aleberry v. Walby*, Str. 230.

(q) *Ankerstein v. Clark*, 4 T. R. 616; *Howell v. Maine*, 3 Lev. 403. The bond in the last case was "*during*," not *before*, coverture. See Com. Dig. Bar. & Feme, (V), and Sel. N. P. 312, n. 13.

(r) *Phillis Kirk v. Pluckwell*, 2 M. & S. 393.

(s) *Weller v. Baker*, Wils., Part II., 424; *Rose v. Bowler*, 1 H. Bl. 114.

(t) *Dunstan v. Burwell*, Wils., Part I. 224.

(u) *Phillis Kirk v. Pluckwell*, ubi supra.

(v) Cases cited Wils., Part II. 424.

(w) *Buckley v. Collier*, 1 Salk. 114.

(x) *Bidgood v. Way*, W. Bl. 1236.

[*98] not, as it would seem, join in the *action with her husband, because the money would be his.(y)

With regard to personal property en action accrued to the wife *before* marriage, or personal contracts or covenants made with her before marriage, as the husband has not by the marriage acquired any absolute right in them, but only a qualified right, requiring to be perfected by reduction into possession, as has been seen,(z) without which they would survive to the wife, she is entitled to the benefit of the possibility of the husband dying before judgment signed, or before execution levied, the effect of which will be found when we come to speak of the effect produced upon her right by survivorship to her chose en action, by action having been brought for it;(a) the husband, therefore, *must* join the wife with him in any action to accomplish reduction into possession of these choses en action.(b) If, however, the liability have been altered *after* marriage, as by the husband giving time to the debtor upon a promise to pay to himself, or upon other new security, the husband must then sue alone.(c) Where the chose en action, accrued to the wife before marriage, is a bill or promissory note, not payable *to order*, so as to be capable, *ex facie*, of indorsement by the husband, but in its form payable to the woman alone, the husband cannot sue for payment without joining the wife with him as plaintiff.(d) If the husband become bankrupt, having in his possession a bill granted to the wife *dum sola*, and payable to herself alone, it will pass to his assignees only as he held it; and it will not be in *their* power any more than it was in *his* to sue for payment without joining the wife in the action.(e)

[*99] *Such being the state of the law in regard to the right of the husband to join the wife with him as plaintiff in certain cases, we shall now consider the consequences, upon her right by survivorship to her choses en action, of the husband having brought action upon them. Should the action brought be in the joint names of husband and wife, and should the husband die after judgment, but before execution, the benefit of the judgment will survive to the wife, and she will be entitled to sue out a *scire facias* upon it: whereas, if the action be in the name of the husband alone, should he die after judgment, but before execution, his representatives would be entitled to the benefit of it.(f)

If the wife had, previously to marriage, brought action and obtained judgment, and after marriage she and her husband join in suing out a *scire facias* upon the judgment, and obtain an award of execution, the property will thereby be so far charged, that, if the wife die before execution had, the husband surviving will be entitled to levy execution.(g)

If the husband prove a debt of the wife under the bankruptcy of the debtor, and die before any dividend has been made, the benefit of the proof will go to the wife surviving.(h)

(y) Pratt v. Taylor, Cro. Eliz. 61; Abbot v. Blofield, Cro. Jac. 644.

(z) Ante, p. 51.

(a) Sherrington v. Yates, 12 M. & W. 855.

(b) Milner v. Milner, 3 T. R. 627; Rumsey v. George, 1 M. & S. 175.

(c) Yard v. Ellard, 1 Salk. 117.

(d) Sherrington v. Yates, 12 M. & W. 855.

(e) Ibid.

(f) Oglander v. Baston, 1 Vern. 396.

(g) Woodyer v. Gresham, 1 Salk. 116.

(h) Anon., 2 Vern. 707.

(b) *Proceedings in Equity.*

So long as money has not been declared in equity to be payable, or been ordered to be paid, to the husband, in a suit founded upon obligations to be performed to the wife, and by a decree which by analogy would be equivalent to such a judgment as in law would be her chose en action, the wife's right by survivorship will be undisturbed.⁽ⁱ⁾ Thus, in a suit for payment of a legacy to the wife, brought *in the joint names of husband and wife, a decree was made establishing the will, under which the [*100] legacy was given, and directing the trusts to be carried out, and an account to be taken of the debts and legacies; but the husband died before any further proceedings had been had, and Sir W. Alexander, C. B., decided that the legacy survived to the wife.^(k)

According to what has been said in regard to judgments at law, it would seem to follow by analogy, that, where a decree for payment has been made in equity, and the husband has died before putting the decree to execution, the benefit of the decree should survive to the wife; and so is the authority of *Nanny v. Martin*;^(l) and some dicta of Lord Hardwicke, in *Bond v. Simmons*,^(m) would support such a doctrine; but it is directly opposed by a decision of Lord Thurlow in *Heygate v. Annesley*.⁽ⁿ⁾ It is worthy of observation, however, that *Nanny v. Martin* is so far confirmed by *M'Aulay v. Phillips*,^(o) where the rights, if not declared in terms, had been so in substance before the death of the husband, and yet the wife was held to be entitled by survivorship.

It will not make any difference upon the question of right by survivorship, that the money has been brought into court,^(p) or that the wife has out of court agreed to terms of settlement, of a certain part of the fund sued for, upon herself and her children.^(q) If these terms have not been approved of by the Court, they will be disregarded, as not binding upon the wife. Whether, if the husband had made a settlement on the wife out of the fund sued for, which had been approved of by the Court, the settlement would be treated as barring the wife's right by survivorship, has not yet, as it seems, been decided; *but in *M'Aulay v. Phillips*, Sir R. P. Arden thought [*101] the settlement would have that effect given to it. On the other hand, if the wife predecease the husband during the pendency of a suit in regard to her chose en action, although the husband will take the fund in his own right,^(r) yet, if, in the wife's lifetime, any order had been made in the suit for a settlement upon the wife and her children, or even upon the wife alone without mention of the children, and she had not waived her right under the order, the husband's right will be subject to the children's claims for a settlement upon the terms of the order.^(s)

(i) *Bond v. Simmons*, 3 Atk. 21; *Forbes v. Phipps*, 1 Eden, 502; *M'Aulay v. Phillips*, 4 Vcs. 15.

(k) *Adams v. Lavender*, 1 M'Cl. & Y. 41.

(l) 1 Eq. Ca. Abr. 68.

(m) 3 Atk. 20.

(n) 3 Bro. C. C. 362.

(o) 4 Vcs. 15.

(p) *Bond v. Simmons*, 3 Atk. 21.

(q) *M'Aulay v. Phillips*, 4 Vcs. 15.

(r) *Forbes v. Phipps*, 1 Eden, 502.

(s) *Murray v. Elibank*, 10 Vcs. 84; *Groves v. Clark*, 1 Kee. 132.

(c) *Submission to Arbitration.*

The effect, upon the wife's right by survivorship, of proceedings under a submission to arbitration in regard to her choses en action, is very much the same as the effect produced by actions at law or suits in equity, and depends upon the particular stage of proceedings at the time of the husband's death. If the husband survive an award of payment to him, but die before actual payment, the right of the wife will be divested, as in *Oglander v. Baston*; (f) where, under a reference between husband and wife and the executor of a testator, in regard to the amount of residuary estate, an award was made for payment of a particular sum to the husband; and, as between the wife surviving and the executor of the husband, it was found that the executor was entitled to the money: the Lord Chancellor there said, the award was a sort of judgment, which had changed the property and vested it in the husband. (u)

[*102]

*CHAPTER III.

RIGHTS ACQUIRED BY THE HUSBAND BY THE MARRIAGE IN THE CHATTELS
REAL OF THE WIFE.§ 1.—*Nature of the Gift by Marriage, and what included under it.*

MARRIAGE is, as it were, an executory gift of the chattels real of the wife; for it is of this anomalous nature, that the vesting of the gift is suspended until the doing of some act of appropriation by the husband, or by his creditor in his right, or until the predecease of the wife; and is altogether defeated by the predecease of the husband without such an act having been done. Thus the husband may dispose of his wife's chattel real by an act to take effect in his lifetime, or his creditor may take it in execution; and in either case the right of the wife, should she survive the husband, will be gone; but if no similar act of appropriation have been done, the wife, if she survive, will take the chattel in her own right, unaffected by any will of the husband, or other instrument made by him to take effect after his death, or by any charge he may have created upon it. (a)

If the husband survive, the chattel will belong to him *jure mariti*, and not as representing his wife; and any bequest of it made by him in such a case, though the will may have been executed during the coverture, will be effectual to pass it. (b)

(f) 1 Vern. 396.

(u) But see *Hunter v. Rice*, 15 East, 100.(a) Co. Litt. 46, b. 351, a.; *Roberts v. Polgrean*, 1 H. Bl. 535.(b) *Young v. Radford*, Hob. 3.

If, on the other hand, the wife survive, she will take *the chattel in her own right, unaffected by any will which the husband may [*103] have made, or by any charge he may have created upon the chattel.(c)

As the husband takes the chattel real of the wife in her right, whether he does so by appropriation in her lifetime or by survivorship after her death, he takes it with no larger interest than she herself had. He is not considered a purchaser for valuable consideration, and therefore he takes subject to every equity that would have attached as against the wife. Should she for instance, have granted an annuity payable out of a renewable term, the annuity will continue payable by the husband out of so much of it as may have to run at the time of his taking. And should the husband renew the term, and pay fines upon the renewal, the annuity will continue a charge upon the renewed term, without any right on the part of the husband to reimbursement of the fines paid by him, for the renewed term is in equity considered the same as the original lease;(d) and it is obvious, that, if the annuitant were to be made to contribute towards payment of the fines for the renewal, the result would be, that he would have to pay the consideration for his annuity twice over, viz. at the original transaction and at the renewal of his security.(e) But if part of the annuitant's security was a covenant for renewal, should the period for renewing occur in the lifetime of the wife, the covenant must of course be performed; should it not occur until after the wife's death, as the covenant will by that event cease to be binding upon the husband surviving, it is optional for him to renew; but if he do so, the annuitant will be entitled to the same benefit as if the renewal had been made in the lifetime of the wife.(f) The observations which have been made apply only, it must be remarked, to the case of an annuity by *purchase; for if the annuity was derived gratuitously, as under [*104] a bequest, the annuitant must contribute towards the fines upon renewals, in proportion to the benefit he takes by them.(g)

The power of the husband over the chattels real of the wife, where they have been settled to her separate use, will be considered when we come to treat of the separate estate of married women; but it may be observed here, that the husband has no power of appropriation by disposition of a chattel real, settled to the separate use of the wife; nor has he such power over a trust term, created for her benefit before marriage, with his assent, though not strictly settled to her separate use.(h)

Under the gift to the husband of the chattels real of the wife, are included, not only such property as is strictly of the nature of chattels real, but elegits, sued out by her before marriage, and her equitable interest of the same nature as an elegit: such as a decree that she should hold lands until satisfied of a sum of money.(i)

(c) Co. Litt. 46, b., 351, a.; *Roberts v. Polgrean*, 1 H. Bl. 535.

(d) *Rowe v. Chichester*, Amb. 719.

(e) *Moody v. Mathews*, 7 Ves. 183.

(f) *Rowe v. Chichester*, Amb. 719.

(g) *Winslowe v. Tighe*, 2 Ball & B. 204; *Stubbs v. Rath*, 2 Id. 553.

(h) *Turner's case*, 1 Vern. 7; *Tudor v. Samyn*, 2 Vern. 270.

(i) *Paschall v. Thurston*, 2 Bro. P. C. 10; *Carteret v. Paschall*, 3 P. Wms. 197; *Mitford v. Mitford*, 9 Ves. 98.

§ 2.—*What Acts by the Husband amount to an appropriation of the Chattel Real, so as to vest it in him.*

With regard to the nature of the disposition by the husband, which will be sufficient to divest the right of the wife to her chattel real, the right of the party in whose favour the disposition is made must commence *in interest* during the life of the husband; but it is not necessary that it should also commence *in possession* within that period. Thus, an underlease, granted by the husband for a term, not to commence until after his death, will [*105] divest the right of the *wife under the original lease, so far as the underlease is prejudicial to such right; (k) and the same will hold in equity, if the original lease were held in trust for the wife, but not for her separate use. (l) Neither is it necessary that the disposition by the husband should cover the whole chattel; so far as it affects the chattel, the disposition will be effectual to the donee, and the right of the wife surviving will be confined to the remainder. (m) The disposition will likewise be good although it should not be absolute, but merely conditional: thus, if its taking effect is made conditional upon previous payment of a sum of money, in such a case should the time for payment occur after the death of the husband, and should his executors enter for the condition broken, the wife's right would be barred. (n) It must be observed, however, that if the payment ought to have been made during the life of the husband, and he should himself have entered for the condition broken, the case will be changed; for, in these circumstances, the wife surviving will be entitled to take the chattel as undisposed of by the husband; (o) for the husband will then be in of his original estate, i. e. in right of his wife, and not of the new estate created, or rather perfected, by his disposition.

In order to give the disposition by the husband the effect of defeating the wife's title by survivorship, it is necessary at law that the particular instrument made by him be such as, when taken in conjunction with the nature of the estate in the chattel that is in him, can according to the rules of law, pass such estate as a disposition of it. Thus, if a husband, possessed of a term of years in right of his wife, with a remainder to himself in fee, were to sell the lands and convey them by *bargain and sale* enrolled, the wife [*106] surviving *would be entitled to the portion of the term unexpired at the death of the husband; because, by the bargain and sale nothing but a use could pass, and the only seisin in the husband, out of which that seisin could be served, so as to admit of the operation of the Statute of Uses, 27 Hen. 8, c. 10, was in the husband's reversion or inheritance in remainder. The legal interest of the term, therefore, of which the husband was not seised but only possessed, remained undisposed of, as the bargain and sale passed only a use at common law and not under the statute; (p) whereas if the form of conveyance used had, in the case supposed, been a *feoffment*, the term would have passed to the exclusion of the wife's right

(k) *Grute v. Locroft*, Cro. Eliz. 287.

(l) *Packer v. Windham*, Pre. in Chan. 412.

(m) *Sym's case*, Cro. Eliz. 33; *Loftus's case*, Id. 279.

(n) Co. Litt. 46, b.

(o) 4 Vin. Abr. 50, pl. 14.

(p) *Moore*, 171, pl. 304.

by survivorship; for, by the livery the husband would have passed his whole interest in the lands, and thus the term would have passed by union and extinguishment.(g) Upon the same principle, if the instrument of conveyance by the husband use terms proper for passing the legal interest, such as "grant and assign," the wife's right by survivorship will be barred.(r)

In equity, the same strictness of expression is not required in order to pass the wife's chattel; for there, what has been agreed to be done is considered as having been done: and therefore an agreement by the husband to assign the wife's chattel will, in equity, be effectual to pass it, and thereby to bar her right by survivorship.(s)

Even at law, the husband may defeat the wife's right by survivorship to her chattel real by acts, which, although not amounting to an express disposition, have the effect of or imply an alienation. Thus, if the husband, holding a term in the right of his wife, grant a lease of the lands covered by the term, for the lives of himself and his wife, the wife's *term would thereby merge, and her right in it be defeated;(t) or if, while [*107] in possession, under a lease to himself and the wife, the husband should accept from the lessor a feoffment of the lands leased, the term would be extinguished and the wife's right along with it; for the livery would amount to a surrender of the term.(u) On the other hand, there are acts by the husband, which, although they amount to an exercise of the right of ownership, yet, as they do not pass the right, will not defeat the wife's right by survivorship. Thus, as will be seen presently,(v) if the husband mortgage the wife's term, or covenant to mortgage it, the mortgage or covenant will be good against the wife surviving only to the extent of the money paid; that once satisfied, the term will continue hers.(w)

If the disposition of the wife's chattel by the husband be by a deed presently absolute in its terms, but which, for its so taking effect in the result, is dependent upon the occurrence of a contingency, the question, whether such a disposition shall defeat the wife's right by survivorship, will depend upon the occurrence or non-occurrence of the contingency in the lifetime of the husband, or, perhaps more strictly speaking, upon the intention with which the disposition was made. Thus, if the husband made an absolute conveyance of the wife's term of years by a deed, with a condition that the conveyance shall be void if the consideration-money paid for it shall be repaid by a time certain, this will amount in substance to a mortgage of the term, and will not defeat the wife's title by survivorship, except to the extent to which the deed was truly intended to operate, viz. as a security for the money; she will therefore be entitled to take the term upon paying the money.(x) If there is anything in the terms of the deed shewing an *intention on the part of the husband to give it an effect ultra a mortgage, this intention will receive effect.(y) But the [*108] mere circumstance of the proviso for redemption pointing to a mode of reconveyance, not in conformity with the original title, will not, as it seems,

(g) *Bracebridge's case*, Plowd. 423.

(r) *Bac. Abr.* "Baron and Feme," C. 2.

(s) *Stead v. Cragh*, 9 Mod. 42; *Druce v. Denison*, 6 Ves. 394.

(t) 2 *Roll. Abr.* 495, pl. 50.

(u) *Downing v. Seymour*, Cro. Eliz. 912.

(v) *Infra*.

(w) *Bates v. Dandy*, 2 Atk. 207.

(x) *Clark v. Burgh*, 9 Jur. 679; 14 L. J., N. S., *Chanc.*, 398.

(y) *Ibid*.

be sufficient to indicate such an intention ; for, where there is no recital of an intention to do more than create a mortgage, the Court reads the instrument with an inclination to believe that nothing more was intended than was necessary to make a security for the money borrowed.(z)

If the proviso for redemption in a mortgage, made by the husband, be in favour not of himself alone, but of himself and the wife, the wife surviving will be entitled to the benefit of it;(a) but if the mortgage was made by the wife herself before marriage, and the husband took an assignment of it and afterwards made a transfer with a proviso for redemption in favour of himself *and* the wife, although the wife surviving will take the term, yet if the husband have, out of his own funds, discharged the mortgage money, in whole or in part, his representatives will be entitled to stand in the mortgagee's place, and to receive from the wife surviving the money so paid by him.(b)

On the same principle upon which, as has been already said, the wife would be entitled to her term, where the husband had disposed of it upon condition, and had entered for breach of the condition, it would seem that, if the husband mortgage the term and afterwards redeem the mortgage, the wife surviving will be entitled to the term, as undisposed of by the husband, who will then be in of his original estate, viz. in right of the wife. But, should the mortgage not have been redeemed at the time stipulated, and thereby the estate of the mortgagee have become absolute, as the alienation by the husband is thus *complete, the right of the wife surviving would be defeated. Whether the equity of redemption were reserved to the husband alone, or to the husband and the wife, if, after the estate of the mortgagee has become absolute by non-payment of the mortgage money, the husband take from the mortgagee an assignment of the term, the wife surviving will not be entitled to the term, for the property in it would thus have been altered ; and the husband, at his death, would not have been in of the wife's right, but of his own right, derived from the mortgagee who had become the absolute owner.(c)

If the deed of the husband do not amount to a grant either of the whole or of a part of the chattel, but is in fact only a collateral grant of something out of it, the wife's right by survivorship will not be thereby barred : thus, the wife surviving may avoid a rent-charge created by the husband out of her term.(d)

If the wife be one of two joint-tenants, of a chattel real, as of a lease for years, the husband may sever the tenancy during the coverture, so as to destroy the co-tenant's chance of right by survivorship, and thereby appropriate to himself a moiety of the estate ; but if he do not do so, and the co-tenant should survive the wife, the co-tenant will take the entire chattel, to the exclusion of the husband, because the survivorship in the joint-tenancy is an older title than the marriage,(e) which did not divest the term out of the wife, but left her estate in it as it was at the first.(f)

Ooke in his Institute(g) says, that if the husband be ejected from lands of which he held a term in right of his wife, and he bring an action of

(z) *Clark v. Burgh*, 9 Jur. 679 ; 14 L. J., N. S., *Chanc.*, 398.

(a) *Pitta v. Pitts*, T. & R. 180.

(b) *Ibid.*

(c) 1 *Prest. Abst.* 345.

(d) *Co. Litt.* 184, b.

(e) *Co. Litt.* 185, b.

(f) *Plow. Com.* 418.

(g) 46 b.

ejection in his own name, and recover judgment, this "is an alteration of the term, and vesteth it in the husband;" but in *Brett v. Cumberland*,^(h) the same judge is reported to have said, that the husband, [*110] after the judgment in ejection, shall have the term only in statu quo; and this would seem to be the sounder doctrine, for the judgment does not in any apparent way alter the title.

The husband may also defeat the wife's right by survivorship in her chattel real by his own criminal act: thus, if he should be outlawed or attainted, acts which incur a forfeiture of his estates, this would operate as "a gift in law" of his wife's chattel real; ⁽ⁱ⁾ or if he should commit *felo de se*, the wife's chattel real would be forfeited, the forfeiture drawing back to the act, done in the life of the husband, which was the cause of his death.^(k)

The wife's right by survivorship may also be defeated by the creditors of the husband, for they may sell the wife's chattel real under a *fiery facias* for payment of the husband's debts; but the sale must have been made in the lifetime of the husband, otherwise the wife surviving will take.^(l)

CHAPTER IV.

RIGHTS ENJOYED BY HUSBAND OVER PROPERTY HELD BY WIFE IN A REPRESENTATIVE CHARACTER, AS EXECUTRIX OR ADMINISTRATRIX.

ALTHOUGH marriage, as has been shewn, is a gift to the husband of all the personal estate of the wife, which she was either possessed of at the time of the marriage, or of which she becomes possessed during the coverture, it is not *a gift of the personal estate which she is either already [*111] possessed of at the time of the marriage, or which she becomes possessed of during the coverture in a *representative character*, viz. as executrix, for in such character she has not any beneficial interest which the law can transfer to the husband.^(a) But the marriage, although it does not vest in the husband any beneficial interest in property held by the wife as executrix, confers upon him certain powers in regard to the administration of property by the wife in that character, which it may not be out of place to notice here, while speaking of the rights of the husband. A married woman cannot take upon herself the office of executrix or administratrix without the consent of her husband. And after she *has* assumed it, whether she did so before or after marriage, she cannot do any act in administration without his consent: nay, more, in one sense she cannot refuse to assume the character of executrix, for her husband may administer and bind her during the coverture, although she should have refused the office,^(b) and he

(h) 3 Bulstr. 163.

(i) Co. Inst. 351, a.

(k) Plow. Com. 261.

(l) Co. Litt. 351, b.

(a) Co. Litt. 351, a; *Thompson v. Pinchall*, 11 Mod. 178.

(b) *Wankford v. Wankford*, 1 Salk. 306; *Adair v. Shaw*, 1 S. & L. 261.

may reduce all the assets into his possession ;(c) and, as the power of sale is incident to the power of administration, the husband may also sell or otherwise dispose of the assets. Thus, a grant by a husband of all his right, title, and interest of and in tithes, a lease of which he held in right of his wife, who was executrix of her former husband, was held to pass the right to the lease ;(d) and a release by a husband of a lease of premises to which his wife was entitled, as administratrix of a former husband, was held to operate as a surrender of the lease ;(e) and a release, by the husband [*112] of an *executrix, of a debt owing to her testator, was held to be a good discharge to the debtor.(f)

This right of disposition, however, by the husband, of personal estate vested in the wife in a representative capacity, is neither one of property, nor has the exercise of it any of the effects of the exercise of a right of property. It is strictly a mere right to perform the representative character vested in the wife, the performance of which by herself would be inconsistent with her position relatively to the husband. Should, therefore, the husband become entitled to a term of years in right of his wife, as administratrix, and have in his own right the reversion in fee of the lands embraced by the term, the term will not be merged in the fee, as it would if the term and the fee had come to him in one and the same right.(g)

It is within the power, however, of a married woman, executrix, to make a will without the consent of her husband, which shall pass such of her testator's personal assets as may remain outstanding at the time of her own death.(h) The effect of this will, however, is not to give any beneficial interest in the property covered by it, but merely to pass the right of representation to the original testator ; any beneficial interest the wife had will remain in her notwithstanding, as if she had died intestate.(i)

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*CHAPTER V.

EQUITY OF THE WIFE TO A SETTLEMENT OUT OF HER PERSONAL PROPERTY.

§ 1.—*Jurisdiction exercised to enforce the Equity.*

MARRIAGE, as already observed, is, according to the operation of the common law, a gift to the husband of the personal property of the wife. It is such a gift as carries along with it an ordinary incident of property, the

(c) Ankerstein v. Clark, 4 T. R. 617 ; Anon. 1 Salk. 282.

(d) Arnold v. Bidgood, Cro. Jac. 318.

(e) Thrustout v. Coppin, W. Bl. 801.

(f) Russell's case, 5 Co. Rep. 27.

(g) Co. Litt. 338. b.

(h) Scammell v. Wilkinson, 2 East, 556.

(i) Stevens v. Bagwell, 15 Vet. 156 ; Hodsden v. Lloyd, 2 Bro. C. C. 543.

right to enforce its recovery. But equity has so far encroached upon the common law in this respect, as to recognise in the wife an equitable right to a provision by the husband, and refuses to give its assistance to the husband for the recovery of the property, unless upon the condition of his making such a provision.

Where, accordingly, the personal property of the wife is recoverable by the husband in a Court of law, he can recover it without interruption, for there is no jurisdiction in such a court to entertain a claim on behalf of the wife or her children for a provision out of the fund sought to be recovered; (a) neither have Courts of equity stretched their jurisdiction so far in favour of the wife or children as to interfere with the husband's proceedings at law, and restrain his recovery of the property at law, until he should make such a provision. (b)

*Where, however, the husband is obliged to resort to a Court of equity, in order to recover the wife's property, legal or equitable, [*114] or to assert his rights in regard to it, the Courts of equity apply to such a case their rule, that he who asks equity must do equity; and, as the property of the wife is, by the marriage, given to the husband as a provision for the maintenance of both husband and wife, the Courts will not apply it to the use of the husband, leaving it in his power to starve the wife, (c) but require from him a consideration for the property (d) in the shape of a settlement on the wife, unless her conduct has been such as to make the Court refrain from interfering in her behalf. Nay, more, Courts of equity will sustain their jurisdiction to prevent the husband recovering the wife's property in the ecclesiastical courts which have concurrent jurisdiction for the recovery of legacies, but do not possess power to adjudicate this equity. (e)

The principle upon which this jurisdiction is founded is, that the equity of the wife to a settlement is grounded upon natural justice, and the administration of it partakes of that parental care which Courts of equity exercise for the benefit of orphans. As the father, therefore, of the wife would have insisted on a provision for her before marriage, the Court, standing in loco parentis to her, will insist for it after marriage. (f)

The equity of a married woman to a settlement out of her personal property, does not bind the property in the hands of third parties. They may, if they choose, assist the husband to defeat the equity, by giving over the property to him upon his demand, and so making his resort *to a Court of equity unnecessary. Thus, where an executor had assented [*115] to a devise of leaseholds to an infant, with a devise over to a married woman, in case the infant should die under age, whereby, on the subsequent death of the infant, the legal estate vested ipso facto in the husband in right of the married woman, the Court, in a suit by the executor to pass his accounts, refused to require a settlement by the husband upon the wife out of the leaseholds, the right of the husband having been complete prior to the insti-

(a) *Oswell v. Probert*, 2 Ves. 680; *Sturgis v. Champneys*, 5 My. & Cr. 105.

(b) *Sturgis v. Champneys*, ut supra; *Jewson v. Moulson*, 2 Atk. 419.

(c) *Oswell v. Probert*, 2 Ves. jun. 682.

(d) *Burdon v. Dean*, 3 Ves. jun. 607; *Milner v. Colmer*, 2 P. Wms. 639.

(e) *Jewson v. Moulson*, 2 Atk. 419.

(f) *Meals v. Meals*, 1 Dick. 373; *Jewson v. Moulson*, ubi supra.

tution of the suit.(g) So, if a trustee of the wife's estate choose to pay it over to the husband without suit, the payment will not be called back, so as to enable the Court to enforce a settlement out of it.(h) Where, however, the aid of a Court of equity is asked by suit, though the equity does not attach upon the filing of the bill, which was at one time held,(i) though erroneously, as will be afterwards shewn, yet should the trustee, after the bill is filed, pay to the husband, the Court would hold the payment to be a wrong, and set it aside;(k) for the suit makes the Court trustee, and takes away from the original trustee that right of dealing with the property which he previously had.(l)

If the wife is the subject of a foreign state, the rights of her and her husband, in respect to his possession of her property, will be regulated by the law of that state; and if by it he is entitled to have the property, without being under the necessity of making a settlement upon her, the property will be delivered over to him to be enjoyed absolutely;(m) or if the parties, whether foreigners or English subjects, have married in a foreign country, [*116] while living there *animo *remanendi*, and have executed a settlement, the Court will direct payment of the wife's estate according to the settlement, as interpreted by the law of the country in which it was made.(n)

§ 2.—*Property of the Wife upon which her Equity to a Settlement attaches.*

The right of a married woman to a settlement out of her own personal property, attaches upon the capital of all property embraced by the gift of marriage, in regard to which the husband has in any way to ask the aid of a Court of equity for the assertion of his rights; and although this right to a settlement is the mere creature of equity, it is enforced, notwithstanding the property may be strictly legal in its nature, and is only incidentally the subject of cognizance in equity; as, for instance, where a legal estate cannot be reached by reason of a prior incumbrance.

While as yet it was undecided that the wife had a general equity against a purchaser from the husband, her right to it against *the purchaser* of her trust term was denied in *Tudor v. Samyne*,(o) and in two other cases it was said to admit of doubt:(p) but in neither of these cases was there any expression of opinion, and still less any decision, that the wife is not entitled, as against *her husband*, to have a settlement out of this species of property; while *Tudor v. Samyne* is an express authority, that, as against him, she is entitled.

The ground of the distinction, so far as regards this equity, supposed to

(g) *Adams v. Pierce*, 3 P. Wms. 10.

(h) *Glaister v. Hower*, 8 Ves. 205; *Murray v. Elibank*, 10 Ves. 90.

(i) *Steinmiz v. Halthin*, 1 G. & J. 64.

(k) *M'Aulay v. Phillips*, 4 Ves. 18.

(l) *Murray v. Elibank*, *ut supra*; *Delagarde v. Lempriere*, 6 Beav. 347.

(m) *Sawer v. Shute*, 1 Anst. 63; *Dues v. Smith*, Jac. 544.

(n) *Anstruther v. Adair*, 2 My. & K. 513.

(o) 2 Vern. 270.

(p) *M'Aulay v. Phillips*, 4 Ves. 19; *Franco v. Franco*, 4 Ves. 528.

exist between trust terms and other equitable estate of the wife, seems to have been that equity should follow the law, and be the same in regard to equitable *terms that the law is in regard to legal terms; and, as the husband may assign the wife's legal term and defeat her right [*117] to it by survivorship, without the possibility of the wife obtaining any settlement out of it, so he should be able to assign her equitable term, unaffected by any equity, for a settlement upon her. But this mode of reasoning goes to overturn the whole doctrine of equity, in regard to the wife's right to a settlement, which at every step is a departure from legal analogy. So long as it was not considered that the wife had an equity for a settlement against a purchaser generally from her husband, without regard to the nature of the property, it was only consistent to deny her that right against a purchaser of her trust term; but now that this equity is well established against purchasers of the wife's other equitable estate, there does not seem to be any reason in principle why it should not likewise prevail against a purchaser of her equitable term.

Accordingly, in *Hanson v. Keating*,(q) Sir J. Wigram, V. C., sustained the right of the wife to a provision out of her trust term, as against a mortgagee of the term under her husband, in her right. His Honor no doubt came to this conclusion with great reluctance, and only in deference to a decision of Lord Cottenham in *Sturgis v. Champneys*,(r) which his Honor thought was opposed to the decision of the House of Lords in *Sir E. Turner's case*.(s) But it does not appear, from the report in *Vernon* or from the order on the appeal, as set out in the note to *Hanson v. Keating*, that the wife's equity to a settlement was at all in question in *Sir E. Turner's case*. All that seems to have been in contest there and to have been decided by the House of Lords was, that the assignment of the wife's trust term was good against the wife's right by survivorship; that it might be well assigned by her husband, as her legal term might be. *There is no inconsistency with such a decision in saying, that although the assign- [*118] ment shall be good to defeat the wife's right by survivorship, she shall nevertheless have, against such an assignee, as she has against the assignee of her other equitable choses en action, an equity to a settlement out of the term. This was all that was done in *Hanson v. Keating*, and all that *Sturgis v. Champneys* was used as an authority for doing. Equity follows the law in allowing the husband to assign the wife's equitable term, as the law allows him to assign her legal term, thereby avoiding to make different estates in the husband in the same thing, according as it may happen accidentally to be in form legal or equitable. But in giving the wife a settlement out of the equitable term, upon the principles laid down in *Sturgis v. Champneys*, equity does not depart from this, or do so because of any difference in the estate held by the husband or any defect in his power to assign, but because the assistance of the Court has become necessary; and its rule is, whatever be the nature of the estate, not to give that assistance, except upon the terms of a settlement upon the wife; and it would follow the same course in regard to the legal term, if, from any accident in the title, its assistance should be required with respect to it.

(q) 4 Hare, 1.

(r) 5 My. & Cr. 97.

(s) 1 Vern. 7.

Of this, *Sturgis v. Champneys*(*t*) is an example. There the wife had a *legal* estate for life in land, but owing to the accident of a prior incumbrance under a trust term for raising provisions for younger daughters existing, the assignee in insolvency of the husband was obliged to come into equity in order to have the benefit of the wife's life estate. Lord Cottenham, after observing that the argument of the assignee was, that the Court would not secure a provision for the wife, unless the property is such as to be a proper subject of equity, and reviewing all the authorities establishing [*119] *the general equity, continued: "What difference can it make, where the assignees of the husband are applying to this Court for its assistance to obtain the property, that the estate of the wife is not a trust, but that the recovery at law is prevented only by the existence of a prior trust estate?" And his Lordship referred it to the Master to approve of a provision for the maintenance and support of the wife.

The decision in *Freeman v. Fairlie*(*u*) was in accordance with this principle, that resort to equity makes the equity attach, without regard to whether the estate is legal or equitable in its nature. There, in a suit instituted by heirs-at-law and next of kin of a testatrix, for a discovery and account of moneys received by an executor, the assignees in bankruptcy of a husband claimed the whole of a fund, consisting of rents of real estate, to which the wife of the bankrupt had been found entitled, without making any settlement upon her, on the ground that the rents might have been recovered at law, and it was only for convenience sake that resort had been had to equity; but Sir L. Shadwell, V. C., on the authority of *Sturgis v. Champneys*, made a reference to the Master to consider of a settlement upon the wife.

But as a Court of equity has jurisdiction in this matter no otherwise than as the husband gives it by coming to ask the aid of the Court to obtain possession of the wife's property, it cannot do more than refuse that aid if the husband refuse to make the settlement, which it requires as the condition of its assistance. In such a case all that the Court does is, to preserve the *capital* of the property for the wife and children.(*v*)

With regard to the *income* of the wife's personal property, *as a [*120] husband is under an obligation to maintain his wife and children, equity permits him to enjoy the income of her property without her consent and without requiring from him any provision for her out of it;(w) and the Court will not deny him its aid to obtain its payment, although he may refuse to make a settlement of the capital upon her,(x) so long at least as he is in a condition to perform his obligation to maintain her and her children. While performing this obligation of maintenance, and while, therefore, no present equity has as yet been raised for the wife, the husband may assign his own interest in the wife's life estate for valuable consideration, and the assignee will be safe from any claim on behalf of the wife for a provision, should the husband afterwards become unable to maintain her.(y)

(*t*) 5 My. & Cr. 97.

(*u*) 11 Jur. 447.

(*v*) *Bond v. Simmonds*, 3 Atk. 19.

(*w*) *Elliott v. Cordell*, 5 Mad. 156.

(*x*) *Bond v. Simmonds*, 3 Atk. 19; *Sleech v. Thorington*, 2 Ves. sen. 561; *Vaughan v. Buck*, 13 Sim. 404.

(*y*) *Elliott v. Cordell*, ubi *supra*.

If the husband has obtained otherwise a considerable portion through the wife, which he has wasted, and the fund under the power of the Court is only a small residue, should he, in such circumstances, refuse to make a settlement, the Court will not only refuse its aid to enable him to obtain payment of the *capital* of this residue, but, so long as he is not starving, will prevent his receiving payment of the *interest* upon it, in order that it may accumulate for the benefit of the wife. (z)

Where, however, the husband has become bankrupt, or taken the benefit of the Insolvent Act, so soon as the title of the assignees under the bankruptcy or insolvency vests, the inability of the husband to maintain the wife, consequent upon his condition, raises an equity for the wife to have a provision secured to her out of her life estate. (a) The husband's creditors, therefore, although entitled in his *right to the income of her estate, [*121] will obtain it only on the condition of making such a provision. (b) In *Ex parte Cosegayne*, where the wife held an annuity of £40 for her life, under a bond to a trustee, the assignees in bankruptcy of the husband were ordered to deliver up the bond, and all arrears and future payments were directed to be paid to the wife for her separate use. And in *Brown v. Clark*, (c) and *Lumb v. Milnes*, (d) the assignees in bankruptcy of a husband, while they were found entitled to the life interest of the wife in residuary estate, were required to make a provision for her out of it. Upon the same principle, although the husband may not have taken the benefit of the Bankrupt or Insolvent Acts, if he have executed a general assignment for payment of his creditors, that will be considered equivalent to the assignment by operation of the statutes, and will equally raise an equity in the wife to have a provision out of her life estate. (e)

§ 3.—*The Proportion of the Wife's Personal Property which is given to answer her Equity to a Settlement out of it.*

The title of the wife to have a settlement out of her property made upon her by her husband, or by those claiming in his right before they can obtain the property, being thus established, in cases at least where no question has arisen upon cruelty or hardship endured from the husband, or of contempt of Court committed by him in marrying its ward, subjects which will be noticed presently, (f) the question suggests itself, to what extent will the property of the wife be devoted for this purpose?

*Where the husband comes before the Court to demand the wife's fund, her equity is enforced against him; and, in giving it effect, [*122] the Courts do not tie themselves down to any precise rule as to the extent to which this is to be done. They have not in any of the cases, most of which are commented upon by Sir Thomas Plumer in *Beresford v. Hob-*

(z) *Bond v. Simmonds*, 3 Atk. 19.

(a) *Ibid.*

(b) *Ex parte Cosegayne*, 1 Atk. 192; *Pryor v. Hill*, 4 Bro. C. C. 142; *Burdon v. Dean*, 2 Ves. 609; *Oswell v. Probert*, 2 Ves. 682.

(c) 3 Ves. 166.

(d) 5 Ves. 517.

(e) *Pryor v. Hill*, *ubi supra*.

(f) *Vide post*, p. 134.

son,(g) given the *whole* fund to the wife. In several,(h) the creditors of the husband have *voluntarily agreed* to settle one half upon her, and the Court has approved of this. In another case,(i) also, with the creditors of the husband, the Court *ordered* a half to be settled. It is to be observed, that in none of these cases was a question raised as to the adequacy, for the maintenance of the wife and children, of the sum settled, nor upon the amount of fortune which the husband received with the wife at their marriage.

But in *Bond v. Simmonds*,(k) Lord Hardwicke, in considering whether the interest upon a part of the wife's property brought into court, which had accrued during the husband's life, should be paid to the wife or to the husband's executors, decreed it to be paid to the wife, because the husband had received with her upon their marriage other considerable property, which he had wasted; and in *Green v. Otte*,(l) Sir J. Leach, referring to *Bond v. Simmonds*, said, "It was always usual to direct the master to have regard to any settlement which the husband may have made upon the wife *aliunde*. If the extent of the provision for the wife, out of the particular property in question, is to be affected by any prior settlement of other property made by the husband, it necessarily follows that regard must ~~also~~ be had to any other property possessed by the husband in right of [*123] the wife; for the prior settlement may not be adequate, or more than adequate, to the equity of the wife in respect of the other property possessed in her right." The amount to be settled will therefore in each case depend upon its own circumstances, in regard to whether the husband may have received any other fortune with the wife, and may have made any settlement upon her out of her property or out of other property;(m) for the consideration of the Court is not confined to the rights of the wife, as regards the particular fund in question, abstractedly from any other provision which may have been made for her from other sources. On the other hand, the adequacy for the maintenance of the wife and children has not formed any element in fixing the amount of the particular fund to be settled. In *Coster v. Coster*,(n) Sir L. Shadwell, V. C., after considering the conduct of the husband in having seduced the wife before her marriage, and the conduct of both the husband and the wife after marriage, with a view to ascertain the origin and justification of a separation which had taken place, decreed three-fourths of the wife's fortune to be settled upon herself and child, and one-fourth to be transferred to the husband. In *Gardner v. Marshall*,(o) the husband had received £6000 from the father of the wife, and between £5000 and £6000 from her uncle's estate, for which he had given a mortgage insufficient by about £1700. After spending this money he became bankrupt, but ultimately obtained his certificate, and for many years lived apart from his wife, to whose support he did not in any way contribute. In a suit by the wife to have a settlement of £4515, the

(g) 1 Madd. 362.

(h) *Jewson v. Moulson*, 2 Atk. 422; *Worrall v. Marlar*, 1 Cox, 158; *Brown v. Clarke*, 3 Ves. 166; *Pringle v. Hodson*, 3 Ves. 619; *Steinmitz v. Halthin*, 1 G. & J. 69.

(i) *Ex parte O'Ferrall*, 1 G. & J. 348.

(k) 3 Atk. 20.

(l) 1 S. & S. 254.

(m) *Elibank v. Montolieu*, 5 Ves. 743; *Like v. Beresford*, 3 Ves. 506.

(n) 9 Sim. 597.

(o) 14 Sim. 575.

amount recovered under the mortgage, Sir L. Shadwell decreed the whole of that sum to be settled upon the wife for her separate use, without power of anticipation, saying, *that, if there was no precedent for doing [*124] so, he would make one. In this last case, although the whole of the particular fund was settled upon the wife, yet this was done, because the Court treated what the husband had received from the father of the wife as part of the wife's fortune, and the fund in question as only the residue of it.

In *Napier v. Napier*(p) the fund was £1000. £1500 of the wife's fortune had been previously received by the husband, and the question as to settlement arose with his assignee in insolvency. Sir E. Sugden, C., ordered £600 to be settled upon the wife, and £400 to be paid to the assignee. In *Brett v. Greenwell*,(q) the question likewise arose with the assignee in insolvency of the husband, who had not made any settlement previous to marriage. Alderson, B., said, the situation of an insolvent was very different from that of a bankrupt, as if he acquired any property, it would all go to his creditors. It appeared to him, therefore, that the wife and children were entitled to the whole fund; and, if he was bound by the practice of the Court to take away from her any part of it, he would take away a shilling.

§ 4.—*The Wife's Power over her Equity to a Settlement out of her Personal Property, whether to assert or waive it.*

While the right of a married woman to a settlement out of her own personal property was hardly well established, or the principles upon which it is founded well defined, it was doubted whether she could maintain a suit as plaintiff in order to obtain such a settlement.(r) It is now, however, no longer doubtful that a married woman may institute a suit, having for its only object the assertion of this equity, *in regard to all property [*125] which is the subject of equitable cognisance.

The equity is personal to herself, however, and entirely under her own control so long as she lives and the matter is incomplete. Thus the wife may renounce the equity, and consent to the property being given over to the husband, even after decree directing him to carry in proposals for a settlement upon her;(s) but the wife must be of age at the time her consent to the estate being given over to her husband is asked. It was argued, in *Abraham v. Newcombe*,(t) that the disability of infancy was merged in marriage, and therefore it mattered not as to the wife's consent whether she were of age; but Sir L. Shadwell, V. C., questioning the accuracy of the report of *Gullin v. Gullin*,(u) refused to take the consent where the married woman was an infant. The same course had been previously followed by Lord Langdale, M. R., in *Stubbs v. Sargon*.(v)

(p) 1 D. & W. 407.

(q) 3 Y. & C. Eq. Ex. 230.

(r) *Ellis v. Ellis*, 1 Sup. Vin. Abr. 475; *Roberts v. Roberts*, 2 Cox, 422; *Elibank v. Montolieu*, 5 Ves. 737; *Carr v. Taylor*, 10 Ves. 574.

(s) *Murray v. Elibank*, 10 Ves. 88.

(t) 12 Sim. 566; 6 Jur. 433.

(u) 7 Sim. 236.

(v) 2 Beav. 496.

But, though the equity is personal to the wife, and under her control up to a certain point, yet the Court administers it, not for the benefit of her alone, but of her together with her children. It will not, therefore, allow her to separate their interests from hers. If she waives her right to a settlement, the waiver must be of a settlement for herself as well as the children.^(w) Whether she could waive the right not only after decree, which she may do as already observed,^(x) but after proposals actually carried in before the Master of the Court under the decree, is a question open to observation. In an anonymous case^(y) Lord Hardwicke, after proposals for a settlement, signed by the husband and wife, had been carried in by the husband, said, [*126] "though the wife might give up her interest under the proposals if she pleased, nobody could consent for the children which might be: the proposal was binding as to them. He therefore refused to allow a sum of money, the property of the wife, to be paid over to the husband, although many years had elapsed without any children having been born of the marriage. In *McAulay v. Phillips*^(z) Sir R. P. Arden said: "I do not mean to determine what the case would have been if the proposal had been approved by the Court and a settlement ordered to be made; perhaps, then, the Court would have considered it as actually made." In *Murray v. Elibank*^(a) Lord Eldon said: "If the wife has this equity for a provision for herself and her children up to the moment of the completion, it is competent to her to give it to her husband." In another branch of the same case^(b) Sir W. Grant said, Lord Hardwicke's observation did not apply, "as I believe no proposal was laid before the Master in this case." In *Fenner v. Taylor*,^(c) Lord Brougham, commenting upon these different observations, said: "Lord Eldon certainly does not state in terms, that, if the proposal had been carried in, it might still be waived, although his language seems capable of that construction;" but his Lordship thought that the fact, that the proposals for a settlement in the case before Lord Hardwicke included the family, made a great difference.

How far this observation of Lord Brougham was sound deserves consideration, when it is remembered that the equity is *always* administered for the children as well as the wife. If, however, by the expression, "the moment of completion," Lord Eldon meant the moment of the wife's signing her approval of the husband's proposal, neither he nor Sir W. Grant disagree [*127] with Lord Hardwicke. On the *whole, it seems that the wife may waive the benefit of a decree ordering proposals to be carried in by the husband; but, after these proposals have been carried in and have been approved of by her and by the Court, the Court will not then allow her further to deal with the equity, which, as before observed, it administers not for the benefit of her alone, but of her together with her children.

Assuming the waiver of the wife to be made before the legal proceedings have arrived at that stage at which the Court will not receive it, it will not make any bar to the husband taking the benefit of the waiver, that he had allowed the right of the wife to be regulated by the ordinary rules followed by the Court upon the subject, but had voluntarily agreed with the wife to

(w) *Murray v. Elibank*, 13 Ves. 6; *Johnson v. Johnson*, 1 J. & W. 475.

(x) *Supra*.

(y) 2 Ves. sen. 672.

(z) 4 Ves. 19.

(a) 10 Ves. 88.

(b) 13 Ves. 6.

(c) 2 Russ. & My. 190.

make a settlement upon her; for this agreement the wife may equally waive, at least, where the benefit is confined to herself. In *Fenner v. Taylor*,^(d) the husband had signed a memorandum before suit, saying, "I do hereby agree that one-half of the property to which Mrs. Fenner is entitled shall be settled upon herself," no mention being made of children. Sir J. Leach, V. C., on the authority of *Ex parte Gardiner*,^(e) refused to allow the wife to waive the settlement, treating the memorandum as an agreement which enured for the benefit of the children, and which, if the wife had sued upon it, would have been executed for their benefit as well as hers. But, upon appeal,^(f) Lord Brougham, C., reversed his Honor's decree. In *Barker v. Lea*,^(g) a bankrupt husband had purchased of his assignees their interest in his wife's estate, subject to her equity to a settlement, which was computed to extend over half of the estate. In a subsequent suit the Court refused to allow the estate to be all paid over to the husband with the wife's consent, because "the wife was to be taken as having claimed her settlement against the assignees, and as having been allowed one-half [*128] the property, which thereupon became equitably vested in her for the benefit of herself and her children, and was no longer in her power. But, as the equity was good against the assignees, and assuming that more of the estate was not apportioned for it than the Court would, in the circumstances, have allotted for that purpose, the assignees did not by the transaction give up any thing beyond what they were entitled to, so as to make it possible to say that they had purchased the settlement for the wife; and even if this could have been said, since they had no right to insist on the wife having the benefit of the transaction, and as the wife was not herself a party to it, it is difficult to see why the transaction should have in any way operated to bar that right which, in ordinary circumstances, the wife would have had to benefit her husband by renouncing her equity to a settlement. However, the judgment in this case was followed by Lord Langdale, in *Whittem v. Sawyer*,^(h) in circumstances nearly similar.

The wife may, as has been seen,⁽ⁱ⁾ waive her equity to a settlement even after decree directing proposals for a settlement, so long as the proposals have not been carried in and approved of by her and the Court; but if she die after such a decree has been made, and before the proposals have been carried in, leaving issue, and without having waived her equity, the Court will not part with the estate to the husband. It will hold him to the order,^(k) on the principle that the wife had by it obtained a judgment for the issue, liable to be waived, no doubt, if she thought proper, otherwise left standing for their benefit at her death;^(l) "and the children [*129] may have the benefit of the order by bill supplemental to that on which it was made."^(m)

The rights of children in a decree directing proposals for a settlement, where nothing has followed upon it, would seem, however, to be operative only against the husband and not against the wife; for should the husband

(d) 1 Sim. 169.

(f) 2 Russ. & My. 190.

(h) 1 Beav. 593.

(k) *Rowe v. Jackson*, 2 Dick. 604; *Groves v. Clarke*, 1 Kee. 132.

(l) *Murray v. Elibank*, 10 Ves. 92; *Lloyd v. Mason*, 5 Hare, 149.

(m) *Murray v. Elibank*, 10 Ves. 92.

(e) 2 Ves. sen. 672.

(g) 6 Mad. 330.

(i) Ante, p. 127.

die after such a decree had been made, the wife, according to *Phipps v. Anglesea*,⁽ⁿ⁾ would be entitled to take the fund absolutely, and unaffected by the decree. But, if the death of the husband does not occur until after the proposals directed by the decree had been carried in and approved of by the Court, the matter will be different; for, according to the opinion of Sir W. Grant, expressed in *M'Aulay v. Phillips*,^(o) the proposals will in such case be held to be binding upon the wife surviving in favour of the children of the marriage.

In *Steinmitz v. Halthin*^(p) Sir J. Leach, while he admitted that the right in the equity to a settlement was personal to the wife, and that the Court did not recognise any original title in the children, held, although the suit for administration of his estate was not instituted by the wife to enforce her equity, but by the executors of the testator (through whom she acquired right to the fund,) that the equity of the wife attached with the jurisdiction which the suit gave to the Court; and that the death of the wife, without having waived the equity, though before answer, gave the children an immediate title to the provision which the wife would have acquired if living. If this doctrine be correct, it would be difficult to discover the principle upon which, as has been seen, the wife can at any time, during the pendency of the suit, renounce her equity and waive a settlement not [*130] only for herself but for her children. The more *sound doctrine seems to be, that the children have no right but by and through the wife; and therefore, if no proceeding should have been adopted by the wife in her lifetime to assert the equity to a settlement, the children have no right to adopt such a proceeding after her death; for their right can arise only out of contract with the wife or under a decree obtained by her.^(q) And even if there should have been a suit, in existence in the lifetime of the wife, through the aid of which the husband may obtain possession of the wife's estate, yet, if there should not have been a decree made in the lifetime of the wife directing a settlement, there would not be any right in the children, after her death, to require a settlement in their favour by the husband.^(r) The judgments of Sir J. Leach in *Steinmitz v. Halthin*, and of Lord Langdale in *Delagarde v. Lempriere*, upon this subject, are directly opposed to each other. Lord Langdale's view, however, was adopted by Sir J. Wigram, V. C., in *Baker v. Bayldon*,^(s) where he refused to recognise the right of children, as against their father, to have the benefit of a settlement out of that part of an intestate's estate which, in an administration suit instituted in their mother's lifetime, was found, after her death, to be her share of the estate.

If the wife was a ward of court at the time of the marriage, which had been celebrated without its consent, the Court will not at any period of the proceedings receive the wife's consent to waive her equity to a settlement. On the contrary, it will compel a stricter and more ample settlement than it would have done in ordinary circumstances, as will be seen in the following section.

(n) 1 Fonb. Eq. 97.

(o) 4 Ves. 19.

(p) 1 G. & J. 67.

(q) *Scriven v. Tapley*, Amb. 509; *Lloyd v. Williams*, 1 Mad. 450.

(r) *Delagarde v. Lempriere*, 6 Beav. 344.

(s) MS. 1848.—Not yet reported.

(t) *Infra*, p. 134.

*§ 5.—*Force of the Wife's Equity to a settlement against the Creditors of the Husband, and likewise against Purchasers from him for valuable Consideration.* [*131]

Such being the equity of the wife to a settlement on behalf of herself and her children, as administered between her and her husband, it remains to consider this equity, as administered between the wife and the creditors of the husband, in bankruptcy or insolvency, or under a voluntary trust for payment of debts, and also between her and purchasers from the husband.

If the property of the wife be such as the assignee of the husband in bankruptcy or insolvency can, as in her right, recover at law, they, like the husband in such a case, will be entitled to recover, without being under obligation to make any settlement upon the wife. But, if they come into equity to ask its assistance to recover the property, the Court will not extend its arm for that purpose without requiring from them a settlement of part of it upon the wife; (u) because the law, when it gives the property of the wife to the husband, imposes upon him the obligation of maintaining her, and if he fails in that obligation, by inability, the Court fastens the obligation upon the property itself; (v) and this, although it should be strictly legal, and its adjudication in equity only accidental, as from the legal estate being outstanding. (w) The same equity will be enforced against the private assignee of the husband under a voluntary trust for payment of debts. (x)

It was at one time doubted whether the equity of the *wife to a settlement would prevail against a purchaser of her property from [*132] the husband; but this is no longer open to question. The first case upon the subject was *Jewson v. Moulson*, (y) which was decided a good deal upon its own specialties. But the naked question presented itself for decision in *Salisbury v. Newton*, (z) where Lord Northington said, the assignee for value could not be in a better situation than the husband himself would have been in, and referred it to the Master to consider of a settlement upon the wife and her children, the surplus of the fund, if any, to be paid to the assignee; and his Lordship made a similar decree in *Wenman v. Mason*, stated in a note to *Bosvill v. Brander*. (a) The question again occurred in *Like v. Beresford* (b) in circumstances more favourable for the purchaser, inasmuch as the assignment had been made in security for advances to the husband and wife while in a state of poverty, and yet a settlement of the whole fund upon the wife for her life was directed by the Court. In *M'Aulay v. Phillips*, (c) Sir R. P. Arden said obiter: "I am clearly of opinion an assignment for valuable consideration will not bar the equity of the wife." His Honor then referred to a decision, in *Deeks v. Strutt*, (d) that an action at law would not lie at the instance of the husband for payment of a legacy to the wife, because, to sustain such an action would have the effect of defeating

(u) *Jacobson v. Williams*, 1 P. Wms. 382; *Burdon v. Dean*, 2 Ves. jun. 607; *Oswell v. Probert*, 2 Ves. jun. 679.

(v) *Aguilar v. Aguilar*, 5 Mad. 414.

(w) *Sturgis v. Champneys*, 5 My. & Cr. 97; *Hanson v. Keating*, 4 Hare, 1.

(z) *Jewson v. Moulson*, 2 Atk. 417; *Pryor v. Hill*, 4 Bro. C. C. 138.

(y) 2 Atk. 417.

(x) 1 Eden, 370.

(a) 1 P. Wms. 459.

(b) 3 Ves. 506.

(c) 4 Ves. 19.

(d) 5 T. R. 690.

the wife's equity, which Courts of equity alone could enforce; and continued: "It would be whimsical, then, that the assignment of the husband for valuable consideration should put the assignee in equity in a better situation than the husband himself is in at law. I am clearly of opinion that it was only a doubt and never was decided, that the husband could by such assignment, or any other means, deprive her of her equity."

*When these observations were made by Sir R. P. Arden in *Philips v. M'Aulay*, the case of *Salisbury v. Newton* had not then been reported; but in *Franco v. Franco*(e) he referred to that case, as having been brought to his attention, and expressed a strong inclination to act in conformity to it, if the state of the principal case had admitted of his doing so. In *Wright v. Morley*(f) it was not necessary for Sir W. Grant to give any judgment upon the equity there claimed by the wife against the husband's assignee, because the assignment was only of part of the fund, and sufficient had been left to answer the equity; but, in giving judgment, he used these observations:—"I agree, Lord Alvanley did uniformly maintain that there is no difference between an assignment for valuable consideration, and by operation of law. Upon principle there is great weight in that proposition; for, if the husband has but the right of reducing the wife's interest into possession, how can he, for valuable consideration or otherwise, convey more than he has? If the assignee acquire a right different from that which the husband had, the husband parts with something different from what he has." In *Elliott v. Cordell*(g) Sir J. Leach said: "When an absolute equitable interest is given to the wife, the Court will not permit the husband to possess it, without making a provision for the wife, or her express consent; and all who claim under the husband must take his interest subject to the same equity."

The law is now understood to be fixed, that the wife's equity to a settlement prevails as well against the assignee of the husband for valuable consideration as against his general assignee by operation of law. Accordingly, in *Hanson v. Keating*,(h) while Sir J. Wigram, V. C. expressed his dissent [134] from Lord Cottenham's judgment in *Sturgis v. Champneys*, *as to the existence of the equity where the subject of the assignment is the trust of a term, he did not intimate any doubt, nor was the question, so far as appears, pressed upon him, that the fact that the assignment was for valuable consideration, and not under the Bankruptcy or Insolvency Act, would not create any difference in the adjudication of the equity.

§ 6.—*Settlements upon Wards of Court married without the Consent of the Court.*

We shall now consider the jurisdiction exercised by Courts of equity as to settlement upon the wife in those cases where, at the time of the marriage, she was a ward of the court and married without its consent, and also in

(e) 4 Ves. 515.

(f) 11 Ves. 11.

(g) 5 Mad. 156.

(h) 4 Hare, 1.

cases in which she is living apart from her husband, owing either to his or her own misconduct.

Where the wife, at the time of the marriage, was a ward of the court, and was married without its consent, the Court not only refuses its assistance to enable the husband to get possession of the wife's estate, unless upon terms of making a settlement out of it, but it puts in motion an active jurisdiction, founded upon the contempt of the Court by the fact of the marriage, and the power of imprisonment which that gives, to compel the husband to make a settlement of the wife's estate;(i) and it will put this jurisdiction in motion although years may have elapsed before the contempt was brought under its notice.(k) In exercising this jurisdiction, the Court will take into view the motives of the husband at entering into the marriage, and his conduct towards the wife both then and subsequently, and will regulate the quantum to be settled, and the mode of *settlement accordingly. Where the conduct of the husband has been very flagrant, either in the way in which he has entrapped the [135] wife into marriage, or in the terms upon which he has lived with her after abduction and prior to marriage, the Court, with the view of defeating the object which the husband had in the marriage, will not allow him to have any part either of the income or of the capital of the wife's estate.(l) But, in order to induce amendment in his conduct and better treatment of the wife, it will give her a power to appoint him a part of the capital by will in case of his surviving.(m)

Where there are extenuating circumstances in the conduct of the husband, and the wife's fortune does not appear to have been his object, the Court allows him benefit from the estate, and treats him as a husband in ordinary circumstances. Accordingly, in one case(n) of this nature, Lord Thurlow approved of a settlement of the wife's estate upon the husband for life, then upon the wife for life, the capital to the children as the survivor should appoint, a moiety to vest in the children at twenty-one. His Lordship said: "I expressly confine it to a moiety, because I think it right that a man should have a proper control over his family." In another case,(o) where, so far as appears from the report of it, there was nothing gross or flagrant in the conduct of the husband, Lord Eldon observed, "there could not be much expectation of happiness where the husband has nothing, and the wife has the whole control over the property. He ought to have some income during the coverture, and she ought to have the power of increasing that by her will." And he directed that the husband should have £150 a year out of £800, with power to the wife to *increase it by will to [136] £300 after her death. But in another case,(p) in which the con- duct of the husband is not stated in the report, Lord Loughborough approved of a settlement which gave the whole income to the wife for her separate use, with a power, in case the husband survived, to give him the interest of a moiety, and observed: "The whole is kept in her power entirely; her

(i) *Ball v. Counts*, 1 Ves. & B. 300.

(k) *Ibid.*

(l) *Chassaing v. Parsonage*, 5 Ves. 19; *Priestly v. Lamb*, 6 Ves. 424; *Millet v. Rowse*, 7 Ves. 419.

(m) *Chassaing v. Parsonage*, ubi supra; *Millet v. Rowse*, ubi supra.

(n) *Stevens v. Savage*, 1 Ves. jun. 155.

(o) *Bathurst v. Murray*, 8 Ves. 77.

(p) *Winch v. James*, 4 Ves. 386.

husband can have nothing but what she chooses to give him, which is perfectly right under these circumstances." Where the husband has not had any property of his own, and the circumstances attending the marriage have been extenuating, the Court has allowed his costs out of his wife's estate.(g)

In the case already noticed,(r) Lord Thurlow, while, in the circumstances, he approved of a power given to the survivor of the husband and wife to appoint the capital of her estate among their children, disapproved of it in so far as it delayed the vesting until the death of the husband, should he be the survivor, and directed an alteration, to the effect of making a moiety vest in the children at the death of the wife.

In any circumstances the Court will not allow the settlement to be so framed as to tie up the wife to the particular marriage, and prevent her from marrying again, by giving the entire estate to the children of the existing marriage, to the exclusion of any power in the wife to give benefit from it to an after-taken husband, or to the children she may have by him.(s) It will modify the settlement, so as to make the property go among the children of any marriage the wife may contract,(t) or, rather, so as to give the wife power [*137] to make it go in that way,(u) and give a benefit to *an after-taken husband.(v) If, however, the parties are equal in rank and station, and as considerable a settlement is made by the husband as is sought from the wife, attention will be given to this circumstance in considering the settlement to be made of the wife's property.(w)

The fact that the wife has committed adultery, and is living apart from her husband, will not, in the case of a ward of court, who has been married without its consent, as in the ordinary case,(x) be any bar to her obtaining a settlement. The Court will view the circumstances which took place at the marriage as having led her into misconduct. In *Ball v. Coutts*,(y) where the question was, whether a voluntary settlement, which the husband had made at the time of the marriage, was sufficient, Lord Eldon did not refuse to entertain this question because of the wife's adultery, which was urged upon him; but, treating the jurisdiction which the contempt had given the Court as still subsisting, although many years had elapsed before the case was brought under its notice, he reviewed the settlement, observing, that, although originally voluntary, if it met with the approbation of the Court, it would no longer be so.

§ 7.—*Maintenance allowed to the Wife where the Husband refuses, without justifiable cause, to maintain her.*

Closely related to the jurisdiction which Courts of equity exercise to compel a settlement by the husband upon the wife out of her own personal

(g) *Anon.*, 4 Russ. 473.

(r) *Stevens v. Savage*, 1 Ves. jun. 155.

(s) *Winch v. James*, 4 Ves. 386; *Wells v. Price*, 5 Ves. 398.

(t) *Millet v. Rowse*, 7 Ves. 419.

(u) *Bathurst v. Murray*, 8 Ves. 78; *Halsey v. Halsey*, 9 Ves. 471.

(v) *Winch v. James*, ubi supra; *Wells v. Price*, ubi supra; *Halsey v. Halsey*, ubi supra.

(w) *Ball v. Coutts*, 1 V. & B. 303.

(x) Vide infra, p. 141.

(y) Ubi supra.

property, is that power which it also puts in motion to provide for the maintenance of the wife where the husband refuses to maintain her out of his *own means. The case of the husband's inability, through bankruptcy or insolvency, to provide for the wife's maintenance, and the equity which this gives her for a provision out of her own property before it can be attached by his creditors, has been already considered. (z) [*138]

Although the husband is bound to support the wife and supply her with the means necessary for her maintenance corresponding to his own rank in life, the civil courts have no direct active jurisdiction to enforce the discharge of this obligation, which belongs exclusively to the ecclesiastical courts. Courts of equity do, however, lend their aid towards the same object, by consenting or refusing to assist the husband in the recovery of the wife's property, according as he may or may not be justified in refusing to support her.

If the wife be living apart from the husband and not actually maintained by him, whether he is to be allowed to receive the income of her estate to his own use or is to be deprived of it, will depend upon how far the failure in her duty to cohabit with him is justified. The case of mutual separation by agreement will be afterwards considered; but, in the absence of any such agreement, the Court will not interfere with the husband's enjoyment of the income of the wife's estate, so long as he has not given her occasion to forsake his protection, either by cruel or improper usage, and her leaving him has been of her own accord, and he is willing to receive her back to live with him, but she, without reason, refuses so to do. (a)

If the cause of separation has been the act of the husband, either by actually turning the wife out of doors or by obliging her to leave his house from cruelty or other improper usage, *the Court will provide a maintenance for the wife out of the income of her estate. (b) It [*139] will do so, even although there may in the conduct of the wife be evidence of levity or indiscretion, if the husband, by his conduct to her before marriage, himself weakened her moral principles, and, by his conduct after their separation, has made it impossible to suppose that the parties could ever live together again. (c) So, if the husband go abroad and desert the wife, leaving her unprovided, the Court will order payment of the income of her estate to her until he return and maintain her; (d) and, if the wife have been maintained by a stranger, on the credit of his being reimbursed out of her estate, the Court will make an order to that effect, (e) upon the ground that the husband left the wife a credit for necessaries, for the amount of which he would be liable to an action, and that he could not therefore obtain the fund without consenting to this application out of it.

If the husband, although originally in fault as to the separation, had not been so far outrageous in his conduct as to preclude the possibility of his wife returning to him, and should, under circumstances of apparent good faith and sincerity, be ready and offer to receive her again under his protec-

(z) *Supra*, p. 131.

(a) *Bullock v. Menzies*, 4 Ves. 798; *Duncan v. Duncan*, 19 Ves. 396.

(b) *Oxenden v. Oxenden*, 2 Vern. 494; *Nicholls v. Danvers*, 2 Vern. 671; *Williams v. Callow*, 2 Vern. 752; *Edes v. Edes*, 11 Sim. 569.

(c) *Coster v. Coster*, 9 Sim. 600.

(d) *Watkins v. Watkins*, 2 Atk. 98; *Sleech v. Thorrington*, 2 Ves. sen. 562; *Wright v. Morley*, 11 Ves. 23; *Coster v. Coster*, 1 Kee. 200.

(e) *Guy v. Perkes*, 18 Ves. 196; *Coster v. Coster*, *ubi supra*.

tion, the probability is, that the Court, if satisfied in these particulars, would not feel itself at liberty to continue a separate maintenance to the wife out of her property. This is to be inferred from the way in which the Court has dealt with cases where the husband has made such an offer, but under circumstances which deprived it of any credit for sincerity or good faith, or left it doubtful in these respects. *In *Watkins v. Watkins*,^(f) [140] although there was evidence that the husband had offered to receive the wife back, yet, as there was evidence, on the other hand, that he had used her very cruelly and barbarously, and that he had, in fact, gone out of the kingdom without leaving a provision or maintenance for her, Lord Hardwicke ordered the interest of her money to be paid to her until her husband thought proper to return and maintain her; and, in *Head v. Head*,^(g) where the husband swore, in his answer to the wife's bill, that he had requested and was extremely desirous that she should return and live with him, yet there was also evidence, that, after the filing of the bill and before the coming in of the answer, the wife had exhibited articles of the peace and obtained surety from him to keep it—Lord Hardwicke admitted that these circumstance might not justify a wife continuing to live separate from her husband, but thought them an excuse at least for keeping the income from him for some time, till their passions might be supposed to have subsided, and they had a prospect, from the interposition of friends, of living happily together. He therefore on motion, before the hearing of the cause, ordered payment of a year's allowance, according to an agreement by the husband, which the bill set up, there being a year and a half's allowance due; but he refused to make any order for the future, observing, that this "was not making a decree before the hearing, but only doing what the husband himself was obliged to do—maintaining the wife until the hearing of the cause upon the merits, and abstractedly from any decree the Court might think proper to make, if there should not then appear to be any foundation for the agreement set up by the bill." As, in the first case which has been [141] mentioned, the maintenance was given until the husband should shew by his conduct *that his offer to receive the wife back was made in sincerity and good faith; and, in the other, until, upon the hearing of the cause, it should appear whether the wife was entitled to insist upon the agreement for maintenance, notwithstanding the offer by the husband; the inference from both of them is, that the maintenance would have been discontinued so soon as it should have appeared that the offer was such as the wife was not justified in refusing.

The amount of maintenance to be allowed to the wife, in case of desertion or compulsory separation, is not regulated by any fixed rule; but, like a permanent settlement, depends upon the circumstances of each particular case, as may be seen by comparing what was done by the Court in the cases quoted below.^(h) If the wife have a fund settled to her separate use, competent for her maintenance, the Court will not make her an allowance for the same purpose out of her other estate.⁽ⁱ⁾

(f) 2 Atk. 96.

(g) 3 Atk. 295.

(h) *Oswell v. Probert*, 2 Ves. jun. 683; *Vandenanker v. Desbrough*, 2 Vern. 96; *Ex parte Cosgayne*, 1 Atk. 192.

(i) *Aguilar v. Aguilar*, 5 Madd. 414.

§ 8.—*Effect of Wife's Adultery upon her Equity to a Settlement or to temporary Maintenance.*

With regard both to permanent settlement and temporary allowance for maintenance out of her estate, the adultery of the wife will be a bar to her obtaining either. The Court will not in this instance depart from its trite rule of requiring those who come before it to do so with clean hands. Accordingly, in *Ball v. Montgomery*,^(k) where the settlement on the marriage of the parties had omitted to make *any express direction as to the application of the income of the wife's estate during their [*142] joint lives, Lord Loughborough refused to give the wife, who was living apart from her husband in a state of adultery, any portion of the income, saying, it would be enormous to give it to her to enable her to keep her gallant. In *Carr v. Eastabrook*,^(l) where the fund was the chose en action of the wife, which she prayed to have settled to her separate use, although she had been living in a state of adultery and was still living separate from her husband, the adulterer, however, being dead, the same judge refused to make any order upon the wife's petition.

Although the Court will not, in the case of adultery by the wife, make her an allowance for maintenance out of her estate, or give effect to her equity to a settlement out of it, it will not follow that the Court will allow the husband to obtain possession of the estate discharged from any liability in this respect, while he is in the circumstances not actually maintaining the wife, for which purpose her estate is given to him by the marriage. So far from this, the Court will avail itself of the jurisdiction which the husband has given it by coming for its aid to obtain possession of the estate, to prevent his attaining this object. In *Ball v. Montgomery*, above referred to, Lord Loughborough followed this course, although he admitted, that the omission in the settlement to make any application of the income during the coverture gave the husband a right to it *jure mariti*, observing, that the delinquency of the wife was no ground for letting the husband receive the whole of the property, which, being hers originally, was intended to be his partly to support her. Accordingly, he ordered the dividends to be paid into court; and in *Carr v. Eastabrook*, *also before noticed, his Lordship refused to make any order upon a cross petition of the hus- [*143] band to have the fund paid to him without a provision for the wife. It is not very easy, however, to see the principle upon which Lord Loughborough proceeded in *Ball v. Montgomery*, when we attend to the conclusion of his observations or the course he contemplated in regard to the ultimate disposition of the income of the wife's estate, which in the meanwhile was not to be given either to the wife or the husband; for, while he refused to give the wife any part of the income, because of the immoral state in which she was living, or to give it to the husband, because he was not bearing the burden in respect of which the income should be his, and because the effect of doing so would be to continue the wife in a state of adultery or reduce her to beggary; and, while he said he could not suppose the husband was to take her back, and approved of the course followed in another case of

(k) 2 Ves. jun. 196.

(l) 4 Ves. 146.

ordering the dividends to be paid into court, he concluded thus:—"The situation of the case will probably produce some agreement for her future support."

If the husband has by settlement acquired right to the income of the wife's estate as a purchaser, of course her separation from him through her own misconduct will not affect his rights in this respect. In the only case which appears to have occurred upon this subject, *Duncan v. Campbell*,^(m) the husband, by settlement before marriage, had renounced any right *jure mariti* to £1000 of a reversionary legacy of £3000, to which his wife was entitled, and agreed to put £2000 of his own money into settlement along with the £2000 of the legacy, on condition that the tenant for life of the legacy would pay immediately the £2000 of the legacy for that purpose, [*144] the dividends of the £4000 to be *paid to the husband and wife during their joint lives for their joint maintenance. The wife, who was living apart from the husband in a state of adultery, claimed to have a moiety of the dividends of the £4000 for her maintenance and support. Sir L. Shadwell, V. C., held, that, in respect of the £2000, part of the legacy, the husband was a purchaser for value; and that, under the terms of the covenant in the settlement to pay the dividends to them for their joint lives, the husband was entitled to receive the payment; and that he could not be deprived of that benefit, because the wife had so misconducted herself that he was justified in living separate from her.

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*BOOK IV.

REAL PROPERTY OF THE WIFE.

In treating of the real estate of the wife, we shall consider, first, the powers she retains, during the coverture, in regard to its management and enjoyment and final alienation; and then those rights acquired in it by the husband by force of the marriage.

CHAPTER I.

RIGHTS IN HER REAL PROPERTY RETAINED BY THE WIFE DURING THE COVERTURE.

No married woman has power to deal with the real property which may be vested in her absolutely at the period of her marriage, or may come to

(m) 12 Sim. 616.

her by an absolute title during the existence of the coverture. This is a disability which prevails equally against the husband as against the rest of the world; and in that respect it differs from the disabilities in regard to personal property. The disabilities of a married woman, to make contracts affecting personal property, may be said to operate for her protection rather than to her disadvantage, since they secure her from personal liability; but, though they have this effect, their original intention seems to have been the protection of the family generally, by securing a single and uniform management of its concerns by the husband: whereas the disability of a woman, *in regard to her real property, is directed against the husband as well as strangers, and has the protection of the interests of the wife [*146] and of her heirs alone in view.

The husband acquires by the marriage, as will be seen presently, a freehold estate in the lands of his wife, by virtue of which he is entitled to regulate their cultivation, and draw the rents or profits as they accrue, and apply them to his own use. But, beyond that, he has no power except to give his assent to the judicial act of the wife, without which she cannot convey the lands.

Prior to the 31st of December, 1833, married women had no power to deal with their own lands, or with their interest in the lands of their husbands, unless by fine or recovery; (a) nor can they since that period do so, unless by deed executed according to the form, and after making the judicial acknowledgment required by the 3 & 4 Will. 4, c. 74; (the act for the abolition of fines and recoveries.)

By that act, sect. 77, it is declared lawful for every married woman, in every case, except that of being tenant in tail, (for which provision is otherwise made by the act,) by deed, to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate, which she alone, or she and her husband in her right, may have in any lands of any tenure, as fully and effectually as she could do if she were a feme sole, save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual, unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as by the act directed; with a proviso that it shall not extend to copyhold lands of or to which a married woman, or she and her husband in her right, may *be seised or entitled for an estate in law, in any case in which any of the [*147] objects to be effected could, before the statute, have been effected by her in concurrence with her husband by surrender to the lord. And it is enacted, sect. 78, that every deed to be executed by a married woman, for any of the purposes of the act, except such as may be executed by her in the character of protector, for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a Judge of one of the superior courts at Westminster, or a Master in Chancery, or before two of the perpetual Commissioners, or two special Commissioners to be appointed as provided by the act. And by sect. 80, that such Judge,

(a) The law upon this mode of conveyance by married women is so fully handled in the books upon real property law, as to make any discussion of it here superfluous.

Master in Chancery, or Commissioner, before they receive the acknowledgment by any married woman of any deed made by her under the act, shall examine her, apart from her husband, touching her knowledge of the deed, and shall ascertain whether she freely and voluntarily consents to it; and, unless she freely and voluntarily consents to it, shall not permit her to acknowledge it; and in such case the deed, so far as relates to the execution of it by the married woman, shall be void. Where the deed is duly acknowledged, it is declared that it shall take effect as to the rights of the married woman from that time.

Where lands are of a copyhold tenure, and the estate to be surrendered is of an equitable nature, the statute enacts that the wife shall, upon making the surrender, be separately examined by the person taking it, in the same manner as if her estate were an estate in law; and every surrender so taken shall be binding on the married woman; and all surrenders theretofore made of equitable estates, where the wife shall have been separately examined by the person taking the surrender, are declared to be valid.

[*148] Where the husband is a lunatic, idiot, or of unsound *mind, although not so found by inquisition, or from any other cause is incapable of executing a deed or making a surrender, or where his residence shall not be known, or where he is in prison, or living apart from his wife by mutual consent, or by divorce, or in consequence of having been transported beyond the seas, or from any cause whatsoever, the Court of Common Pleas may, upon the summary application of the wife, and such evidence as to it shall seem meet, dispense with the concurrence of the husband.

Where the married woman has a mere power in regard to real property, reserved by herself before marriage, or given to her before or after marriage by third parties, she could always and may still exercise it, without the consent of her husband, (whose rights cannot thereby be prejudiced,)(b) although she may be an infant at the time of doing so.(c) If the power was reserved by herself before marriage, to be executed *dum sola*, she cannot execute it during the coverture, for she cannot do so according to its terms.(d)

Prior to the 29th Geo. 2, c. 31, a married woman holding a renewable lease for lives could not have taken a renewal of it; but now, by that statute, she may, after application to a Court of equity, either by herself or some one on her behalf, surrender the old lease and take a renewal, as effectually as if she were a *feme sole*, the new lease being subject to the same trusts, charges, and incumbrances as the old one.

(b) *Southby v. Stonehouse*, 2 Ves. sen. 610; *Daniel v. Upton*, Noy, 80; *Tomlinson v. Dighton*, 1 P. Wms. 149.

(c) *Hearle v. Greenbank*, 3 Atk. 710.

(d) *Antrim v. Buckingham*, Ch. Ca. 17.

*CHAPTER II.

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RIGHTS IN WIFE'S REAL PROPERTY ACQUIRED BY THE HUSBAND THROUGH
THE MARRIAGE—BEFORE ISSUE BORN.

It must be remarked at the outset, that the estate which the husband takes in the wife's real property is more or less ample, according as there may or may not be issue born of the marriage.

By the marriage, while as yet no issue have been born, the husband acquires a freehold interest, during the lives of himself and the wife, in all such freehold property of inheritance as she was seised of at the date of its celebration, and which she becomes seised of during the coverture. The nature of this estate, then, is not that the husband alone, but he and the wife together, are, in right of the wife, seised of a freehold estate of inheritance in her freehold lands of inheritance. It should be observed, however, that, if the lands of the wife are held by her in *gavelkind*, the interest of the husband in them is confined to a moiety, and ceases upon his again marrying. (a)

The estate in the wife's lands, acquired by the husband by the marriage alone, is, however, so large that it is sufficient whereon to work a remitter to him, in case he may have been previously seised of the lands upon an older but defeasible title, and to enable him to take a release or confirmation to enlarge his estate; and while recoveries were in use he might alone, without the wife, have made a tenant to the præcipe for suffering a recovery. Yet, as the estate is only in right of the wife, should the husband be attainted *of felony, the Crown will not, by his escheat, acquire the freehold of the lands: that will, nevertheless, continue in the [*150] wife. All that the Crown will take is the pernancy of the profits during the continuance of the coverture. For the same reason, should the wife be attainted of felony, the lord might enter to the lands by escheat and eject the husband, whenever the Crown had had its prerogative forfeiture of a year and day's waste.

CHAPTER III.

RIGHT IN WIFE'S REAL PROPERTY ACQUIRED BY THE HUSBAND THROUGH
THE MARRIAGE AS TENANT BY THE CURTESY—AFTER ISSUE BORN.§ 1.—*Nature of Estate by the Curtesy.*

So soon as issue are born, the right of the husband is changed in its character. By the birth of the issue he becomes tenant by the curtesy initiate,

(a) Rob. on Gavel. 177.

and, as such, takes an estate in the lands of the wife in his own right. The right of the husband, as tenant by the curtesy *initiate*, will be better understood after the nature of the estate, which he takes as tenant by the curtesy, has been considered.

The law gives a husband who has had issue by his wife, as in his own right, and to continue after the death of the wife, an estate for his life in the freehold lands of inheritance, of which she was seised at the date of the marriage, or of which she became seised during the continuance of the coverture. This estate has received the term of "The Curtesy," as [*151] some say, because it is given by the curtesy or *favour of the law, and, as others say, because it is in some way derived from the Latin word "*curtis*;" the husband, so soon as he has issue, becoming one of the "*pares curtis*," attending at the lord's court.

§ 2.—*Concurrence of Things necessary to give a Title to Curtesy.*

In order to give a title to this estate by the curtesy, the concurrence of three things is necessary: first, legal marriage and power to hold and enjoy real estate; secondly, seisin by the wife; and, thirdly, inheritable issue.

(a) *Legal Marriage.*

What is legal marriage need not be discussed here, further than to observe that formerly it was held that the husband of an idiot wife, found such by office, was not entitled to curtesy, the Crown being entitled to her lands by prerogative discharged from the curtesy. This doctrine can have no place now, because modern authority has settled that an idiot cannot marry, being incapable of that consent which is necessary to every contract.

Where the husband is an *alien*, marriage alone is not sufficient to give him a right to the curtesy; for the law will not allow a foreigner to hold and enjoy land. To enable an alien, therefore, to claim by the curtesy, he must have been either naturalised by act of Parliament or made a denizen by letters-patent from the Crown—two proceedings which differ very much in their consequences; for naturalization operates retrospectively, and removes all disabilities *ab initio*; while letters-patent of denization take effect only from their date. The effect of this upon the right to curtesy may be important, as will be seen when we come to speak of inheritable issue.

(b) *Seisin in the Wife.*

*The second requisite in order to give a title by the curtesy, as [*152] has been said, is a seisin in the wife. In order to apprehend this subject, it is necessary to premise that the different species of property subject to curtesy are corporeal, such as manors, lands, and those hereditaments of which seisin *in fact* can be had; and incorporeal, such as rents, tithes, commons, advowsons, and offices of inheritance, of which only seisin

in law can be had; and also equitable, such as trusts, equities of redemption, and the like, of which *equitable* seisin can be obtained. Of a mere right, title, condition personal, and the like, such as a grant of a personal annuity to the wife and her heirs, there is no curtesy. The reason for this probably is, that curtesy had its origin in feudal times, when *tenure* was made incident and necessary to it.

It may also be premised, that, as tenancy by the curtesy is an estate in the freehold inheritance of the wife, it will not arise out of any estate less than one of inheritance, such as a tenancy *for life* or *at will*. And, as the interest of a copyholder in his copyhold is considered but as an estate at will, the husband of a feme copyholder is not entitled to curtesy of the copyhold lands unless the right is given expressly by the custom of the particular manor.(a)

Such being the kinds of property subject to curtesy, and the nature of the estate in the wife requisite to support the title to it, let us now consider the seisin necessary to be in the wife for the same purpose, dividing the subject according to the different kinds of seisin, viz. seisin in fact, seisin in law, and equitable seisin. And, first, seisin in fact.

(1) *Seisin in Fact.*

In order to found a title to curtesy in property of which there can be seisin in fact or actual entry, such as lands and *tenements, an entry must have been made in the life of the wife. This is neces- [*153] sary because of the third requisite to a title to curtesy, for without the entry the issue could not take the estate as heirs of the wife; and it is essential to this title, as will be presently seen, not only that the husband should have issue by the wife, but issue that could inherit the lands by descent from her; and it is a rule of law, that the heir claiming by descent must derive his title from the person last seised of the inheritance. The law upon this subject is handled at length by Lord Alvanley in *Doe v. Hutton*.(b) If, therefore, A. be seised in fee simple or fee tail general of lands which descend upon his daughter B., who afterwards marries and has issue, if B. die before entry to the lands, made either by her or her husband, or by some other person for them, the husband will not be tenant by the curtesy, because the wife had not a seisin *in fact*, but one *in law* only.(c) So, also, if a woman were disseised of her lands before marriage, and no re-entry were made in her lifetime, the husband would not be entitled to curtesy of the lands, for the wife was never seised during the coverture, and had only a right of entry or of action.(d) But if a feme sole be disseised, and, after marriage, re-enter without her husband's knowledge, and the disseisor again enter during the coverture, the husband, after the death of the wife, on learning of the re-entry of the wife, might enter, oust the disseisor, and enjoy the lands as tenant by the curtesy,(e) for the wife was, by her re-entry, seised during the coverture.

Actual entry in the lifetime of the wife being necessary, as before

(v) *Paulter v. Cornhill*, Cro. Eliz. 361.

(b) 3 B. & P. 643.

(d) *Perkins*, s. 458.

(c) Co. Litt. 29.

(e) *Ibid*.

observed, in order to found a title in the husband to the curtesy of her lands, it will not be sufficient that she or the husband had done every thing in their power to make an entry; for, where entry is otherwise possible, nothing *short of actual entry by the wife, the husband, or [*154] some one else on her behalf, will suffice.(f) But if the lands were let on lease at the date of the marriage, and the wife should die before any rent under the lease should have become payable, the husband will be entitled to the curtesy because there was no possibility to get seisin,(g) or, rather, because such possession had been obtained as the lands were alone capable of in the circumstances; for in such a case the possession of the lessee is held to be the possession of the wife; indeed this was held in a case where the wife survived the rent-day four months,(h) because, although no rent had been received by the wife, so none had been received by any other person against her from the tenants, who were in great arrears at the time the land descended upon her.

When the custom of a manor gives the right to curtesy, the husband will be entitled to the enjoyment of it, although the wife should have died after surrender of the lands made to her, but before her admittance. This apparent conflict with the principle, which, in regard to fee simple lands, requires that there should have been actual seisin in the life of the wife, is solved by this other rule in regard to copyhold estate, that the admittance of a tenant to copyhold estate draws back by relation to the date of the surrender, so that in this way there was an actual seisin in the life of the wife in the case stated.(i) But where the custom of a manor gives a right to curtesy, as it in this respect makes an exception to the general law of copyholds, the custom is construed with strictness. Thus, should the rule according to the custom be, that a man, taking to wife a customary tenant and overliving her, having had issue by her, shall be tenant by the curtesy, the husband of a feme copyholder of the manor would not be entitled to curtesy unless [*155] the wife *was actually a tenant at the date of the marriage; for if she only became such after that period, the man could not, according to a strict construction of the custom, be said to have taken to wife a customary tenant.(k)

To return to the law in regard to curtesy in fee simple lands. In order to give a title to curtesy, there must, at some period of the coverture, have been not only a seisin in the wife, but a seisin which covered the *entire* inheritance. Seisin, therefore, of a reversion, expectant upon an estate for life, which life did not expire during the coverture, will not entitle the husband to curtesy; the reversion must have come into possession by the determination of the life estate in the lifetime of the wife.(l)

This rule, that possession of the entirety of the inheritance must have been vested in the wife at some time during the coverture, leads to the consideration of those cases in which estates of different qualities vest in the wife. If, by one and the same instrument there are given to the wife a life estate and a reversion in fee, with an interposition of contingent remainders to another person between the two estates, should circumstances so happen

(f) Doct. & Stn., 2 Dial. 15; Perk. s. 470.

(g) Co. Litt. 15, b.

(h) Grey v. Richardson, 3 Atk. 469.

(i) Vaughan v. Atkins, 5 Burr. 2764.

(k) Savage's case, 2 Leon. 109; see Scriv. on Copyholds, 97.

(l) Co. Litt. 29, a.

that the life estate and the reversion vest in the wife, at one and the same time, before the contingent remainders had all arisen, there would be an opening to let in the contingent remainders as they might arise; (m) and should they arise, so as to occasion this opening, the wife would then be considered as having been seised ab initio of only a life estate, and the husband in such case would not be entitled to curtesy; unless, indeed, the contingent remainders should become exhausted, and the reversion again vest in possession in the wife before expiration of the coverture. But if, in the case of the instrument just supposed, the reversion in fee should vest in the wife at a *different time from the vesting of the life estate, though it should do so by descent, as the remainders not yet arisen would [¶156] be thereby destroyed, (n) the husband would be entitled to curtesy; and he would likewise be so entitled, if, in the first case supposed, after the life estate and the reversion should have vested in the wife at one and the same time, the contingent remainders should never arise, so as to occasion an opening in order to let them in, for in that event the wife's seisin of the entire inheritance would never have been disturbed.

Where the right of the wife to the freehold and to the inheritance are derived by two distinct titles, the right of the husband to curtesy will depend upon whether the estates are or are not merged in each other. Thus, if the title of the wife to the freehold be under a will creating contingent remainders after her life estate, should the fee come to the wife by *immediate* descent, as the heir of the person by whose will the remainders were created, the descent will not merge the life estate in the fee and destroy the remainders, for to give it that effect would be to defeat the will in its inception, by preventing the life estate to the wife or the remainders ever having existence; and the consequence necessarily is, that the husband will not in such a case be entitled to curtesy. But if the title of the wife be by deed or will, giving her a life estate and creating contingent remainders, should the fee, before the remainders have arisen, come to her by mediate descent, as heir, not of the maker of the deed or will, but of some third party, as of his heir or of a devisee under the will, the life estate will merge in the fee and thereby destroy the remainders; for, to give it this effect, does not necessarily defeat the deed or will in its inception, by preventing the life estate having existence, but only exposes it to that chance of extinction to which *this particular kind of estate is in the general case subject; and as the effect of the merger of the life estate in the fee is to [¶157] vest both the freehold and the inheritance in the wife, the husband will in this case be entitled to curtesy. The cases in the books seem to be contradictory as to the effect, upon the life estate, of descent of the fee; but this distinction between the effect of immediate and mediate descent seems to reconcile the apparent discrepancy.

If a term of years only be interposed between an estate for life in the wife and her reversion in fee, or if she be seised of the fee, subject to a term of years vested in another, there will be such a seisin in her as will support a title to curtesy in the husband. (o)

(m) Hooker v. Hooker, 2 Barnard. 200; Doe v. Scudamore, 2 B. & P. 294.

(n) Hartpole v. Kent, Jones, 76; Hooker v. Hooker, 2 Barnard. 200,

(o) Grey v. Richardson, 3 Atk. 469.

Where the estate of the wife is a *joint* tenancy with another, the husband has no title to curtesy if she predecease her co-tenant; for, by the original feoffment and by survivorship, the co-tenant has a title in the lands paramount to that of the curtesy, and may plead the feoffment to himself without naming the wife, his deceased companion, who had but a defeasible estate of inheritance, which was put an end to by her predecease. (p) But it is otherwise if the estate of the wife was a tenancy in *common*; for, in such estate, each tenant has a several freehold and inheritance in his moiety, descendible to his heir; the husband therefore is entitled to curtesy; and the case of this estate is also an exception to the rule, that there must have been actual seisin in the wife: for if the co-tenant have had seisin, that will be sufficient, inasmuch as, in tenancy in common, the possession of one tenant is considered the possession of his co-tenant. (g)

If lands be given to two women and the heirs of their bodies begotten, should one of them take a husband and die, leaving issue, and the other [*158] survive her, the deceased's husband *will not be entitled to be tenant by the curtesy; for each of the women took under the gift only an estate for life in joint tenancy, with a several inheritance not to take effect until after the death of the survivor; so that the freehold and inheritance were never vested in the predeceasing. (r)

If the estate of the wife have been sufficient whereon to found a title to the curtesy, the title will remain although the estate of the wife should be spent at her death. Thus, if the wife should be tenant in tail general, and have issue who die, and should herself die without having other issue, whereby the estate tail would be spent, the husband would, nevertheless, be entitled to be tenant by the curtesy. (s) But, if not only the estate of the wife is spent, but also that out of which it was derived, the title to curtesy will necessarily determine likewise. Thus, if a woman, possessed of lands, make a gift of them in tail, reserving a rent out of them to herself and her heirs, and afterwards marry and have issue by her husband, if she should die, and then the donee of the estate tail should likewise die without issue, as the rent would necessarily be at an end by the non-existence of any one charged with its payment, the title of the husband to curtesy of the rent would expire with the rent itself; (t) whereas, if a woman, tenant in tail general of a rent reserved by another, were to take husband and have issue by him, who should afterwards die, the husband would, nevertheless, be entitled to be tenant by the curtesy of the rent, which would still continue in existence after the death of the wife. (u)

If a woman, seised of lands, were to make an estate therein for life to another, reserving a yearly rent to herself and her heirs, and should afterwards marry and have issue, if the life estate endure beyond the determination of the coverture, *her husband would not be entitled to be [*159] tenant by the curtesy of her reversion in the lands, because she would not have had any seisin in it during the coverture, neither would he be entitled to be tenant by the curtesy of the rents, because she had neither a fee simple nor a fee tail therein, but only a particular estate. (v)

(p) Litt. s. 45.

(r) Co. Litt. s. 283; Roll. Abr. 90, I.

(t) Co. Litt. 30, a.

(g) Sterling v. Pennington, 7 Vin. Abr. 150, pl. 11.

(s) Co. Litt. 30, a.; 8 Co. Rep. 34 a.

(u) Ibid.

(v) Co. Litt. 32, a.

(2) *Seisin in Law.*

Where the inheritance of the wife lies in grant, and is, therefore, incapable of seisin in fact, it will be sufficient, in order to found a title to curtesy in the husband, that such seisin has been had as the property admits of. Indeed, seisin at all will be dispensed with where it was impossible in the circumstances to obtain it; for "*Impotentia excusat legem*," and "*Actus Dei nulli facit injuriam*." As in the case already put,^(w) of lands let on lease, and the wife dying before any rent had become payable. Or if a man, seised of an advowson in gross, or a rent in fee, should have issue a daughter, who marries and has issue, and thereafter he should die seised; if the daughter should die before the church became vacant or the rent payable, her husband would be entitled to be tenant by the curtesy of the advowson or the rent, although she had but a seisin in law, because in the circumstances it was not possible to obtain seisin in fact. If, however, in the case supposed, the advowson, instead of being in gross, had been appendant to a manor, and the daughter had died before entry to the manor, as her husband could not be tenant by the curtesy of the manor, of which seisin in fact was requisite and could have been obtained, so he would not be entitled to be tenant by curtesy of the advowson, for the right to it will follow the right to the manor, its principal.^(x) Perkins,^(y) says, that, in the case of an advowson in gross, if the church should become vacant in the life of the wife, and she should *die after the six months for presentation, without any presentation having been made by her or her [*160] husband, the husband will, nevertheless, be tenant of the advowson by the curtesy, if the bishop should have presented on the lapse. For this, however, there does not appear to be any authority; and, upon principle, the case is not within the rule which dispenses with seisin in fact, for seisin in fact was attainable and might have been attained but for the default of the wife and her husband.

(3) *Equitable Seisin.*

It only remains now to consider the equitable seisin necessary to give a title, as tenant by the curtesy, to property of an equitable nature. With regard to the seisin necessary for this purpose, *equity*, in order to preserve uniformity with the *law* as to the rights of property, gives *equitable* interests the same construction and effect, in relation to curtesy, which they would receive if *legal*. The same seisin, therefore, which, if the property were legal, would give the husband a title to curtesy, will give it where the property is equitable. Accordingly, the surviving husband of a cestui que trust, who was entitled to a conveyance of lands to herself after payment of the truster's debts, and who, during the coverture, had enjoyed her proportion of the surplus rents, but died before the conveyance was made, was found entitled to curtesy of the lands.^(z) So, the husband of a feme mortgagor, of lands mortgaged before marriage, who had been allowed by the mortgagee to continue in possession throughout the coverture, was found entitled to be tenant by the curtesy of the mortgaged premises, as an equity

(w) Ante, p. 154.
(y) Sect. 468.

(x) Hale, MS.
(z) Watts v. Ball, 1 P. Wms. 108.

of redemption was an estate in the lands, and the wife had such possession of it as was equivalent to an actual seisin of a freehold estate at law.(a)

[*161] Curtesy is given not only of a trust estate *executed*, but of *an *executory* trust estate; for Courts of equity, in regard to this, give effect to the rule of equity, that what has been directed to be done shall be considered as having been done. Thus, if money should be bequeathed to be laid out in the purchase of lands to be settled to the use of a woman in tail, should the woman marry and have issue, and die before the land had been purchased, the money would be considered as land, and her husband surviving would be entitled to the interest of it for his life, as tenant by the curtesy.(b)

Where property is limited in trust for the separate use of a married woman for life, and after her death in trust for her heirs, an important question arises whether the husband can be tenant by the curtesy. The decisions upon this question have been conflicting; but, according to the latest of them, reviewing the earlier ones, it has been held, that, where no intention is expressed in the gift of the property to exclude the curtesy in terms, the life estate of property, limited in the manner suggested, unites with the inheritance, so as to vest in the wife an equitable estate of inheritance, and make the husband tenant by the curtesy. The first case upon the subject was *Roberts v. Dixwell*.(c) There, lands had been devised in trust for the separate use of a married woman, with a direction that the husband should not intermeddle with the rents and profits, and after her death in trust for the heirs of her body. Lord Hardwicke held, that the wife took only an estate for life, which necessarily excluded the curtesy; but, in delivering his opinion, he said, that, if the wife had taken an estate tail, the husband would have been tenant by the curtesy; and the devise being for the separate use of the wife would not have barred him, "because there was a sort of seisin in the wife;" and the husband did [*162] *not require in the life of the wife, to be seised of the rents and profits. However, in the next case, *Hearle v. Greenbank*,(d) where lands were devised in trust to apply the rents for the separate use of the testator's daughter, a married woman, not to be subject to the debts or control of her husband, and upon further trust to permit the daughter to give and devise the estates as she should think fit, the same judge, while he held that the inheritance descended upon the daughter till the execution of the power, decided that there was no seisin in deed during the coverture, as the testator had made the daughter a feme sole; neither was there any equitable seisin, since to hold so would be directly contrary to the testator's intention; and consequently the husband was not entitled to curtesy. The question again arose in *Morgan v. Morgan*,(e) where the conflicting opinions in *Roberts v. Dixwell*, and *Hearle v. Greenbank*, were brought forward and considered. In this case, lands had by marriage settlement been conveyed in trust for the separate use of the wife for life, with power to her to appoint the fee by deed or will, and for want of appointment in trust for her heirs

(a) *Casborne v. Scarfe*, 1 Atk. 603.

(b) *Sweetapple v. Bindon*, 2 Vern. 536; *Cunningham v. Moody*, 1 Ves. sen. 176; *Dodson v. Hay*, 3 Bro. C. C. 404.

(c) 1 Atk. 607.

(d) 3 Atk. 696.

(e) 5 Madd. 408.

and assigns. Sir J. Leach, V. C., said, it must be admitted that the two cases, of *Roberts v. Dixwell* and *Hearle v. Greenbank*, could not be reconciled; and, between the conflicting opinions of Lord Hardwicke, recourse must be had to principle and analogy. There was no doubt the wife had an equitable estate of inheritance, notwithstanding the rents and profits were to be paid to her separate use for life. The wife was in possession of the lands by receipt of the rents and profits during the coverture, and there being issue, capable of inheritance, the husband must be entitled to the curtesy, unless it could be held, that the direction that the wife should take the profits to her separate use amounted to an express intention to exclude him. At law he could not be excluded, but *in equity he might, [*163] not only partially, but wholly, as in *Bennett v. Davis*.^(f) Here he was partially, not wholly, excluded from the enjoyment of the wife's property. The Court, according to the intention of the settlement, would have restrained him from interference with the rents and profits during the life of the wife, but there being no further exclusion expressed, the Court could have no authority to restrain him from the enjoyment of his general right, as tenant by the curtesy, in the equitable inheritance of his wife. The judgment was followed by Sir L. Shadwell, V. C., in *Follett v. Tyrer*,^(g) where the estate of the wife was settled precisely in the same manner.

Where an express intention to prevent the enjoyment of the estate by the curtesy is shewn by the terms of the gift of the property, although these terms should not be such as to interfere with the legal operation of the gift by which the curtesy would vest in the husband, yet the husband will be treated in equity as trustee for the parties, intended by the donor to be benefited, to his exclusion.⁽ⁱ⁾ But if no intention of this kind is manifest from the terms of the gift, and if the enjoyment of the estate of curtesy is not inconsistent with what may have been done by the donor of the property, Courts of equity will not interfere with the right which the law gives the husband to that enjoyment.^(k)

If a testator, by his will, give several benefits to a husband and wife, and at the same time dispose by it of property which belonged to the wife, but of which the testator supposed himself to have the power of disposition, should the wife, by her husband, take her own estate, and renounce the benefits given to her by the will, and should the husband take the benefits given to himself by the will, *the husband will, nevertheless, be entitled to the curtesy of the wife's estate, and will not be put to [*164] elect between it and the benefits given by the will; because he takes the curtesy as a stranger to the will, entitled to the continuation of the wife's estate for which she made compensation to the devisees by renouncing the benefits given to her by the will.^(l)

(c) *Inheritable Issue born of the Marriage.*

The third requisite to entitle the husband to be tenant by the curtesy is, that there should have been issue born of the marriage. The reason of this will be understood, when it is remembered that tenancy by the curtesy is

(f) 2 P. Wms. 316, noticed *infra*.

(g) 14 Sim. 125.

(i) *Bennett v. Davis*, 2 P. Wms. 316.

(k) *Steadman v. Palling*, 3 Atk. 423.

(l) *Cavan v. Pulteney*, 2 Ves. jun. 545; 3 Ves. 384.

an excrescence upon, or a continuance of, the wife's inheritance, which otherwise would cease at her death. *(m)* This rule, that there must have been issue of the marriage in order to entitle the husband to be tenant by the curtesy of the wife's lands, applies to all lands held in fee simple, except those of gavelkind tenure, in regard to which the husband may be tenant by the curtesy, although he may not have had issue by the proprietrix of them. *(n)*

The issue required to give the title to curtesy must have been born during the coverture; *(o)* but it is not necessary that the birth should have taken place before the wife became seised of the lands, or that the issue should have survived that period. Whether the husband would be entitled to the curtesy, if the issue were born by the Cæsarian operation, i. e. after the coverture had ceased by the death of the wife, is a question open to doubt, as the law now stands, though it is not very creditable to the law that this *[*165]* should be the case. According to Coke, *(p)* the husband *would not in such a case be entitled, because, as he says, the child was not born in the life of the wife, and in the meantime the land descended. But by the construction which has been put upon the 10 & 11 Will. 3, c. 16, a child en ventre sa mere is to be considered as in esse, not for its own benefit alone, in the strict terms of the statute, but for other purposes; *(q)* and it has been found to be included under the description of children born at a particular period; *(r)* so that the husband claiming the curtesy might, in the case supposed, be justified in pleading issue born during the coverture. It has, however, been determined, that although a child en ventre sa mere is to be considered as born, the lands descend to the next heir in the meanwhile, subject to divest on the occurrence of the actual birth; but that the effect of the birth has not relation back; and that the lands do not divest ab initio from the death of the ancestor. *(s)* If there be any substance, therefore, in the other part of Lord Coke's objection, that the lands have in the meantime descended, it remains unanswered by anything which has yet occurred.

Where the issue has been born after the natural manner, if it be alive at its birth, that is sufficient. It is not also necessary that it should have been heard to cry, as was formerly supposed, for that is only one among other proofs of living birth. *(t)*

As curtesy must, in its inception at least, come out of the inheritance of the wife, it is necessary, not only that there have been issue born of the marriage, but that the issue be such as may inherit through the wife. Thus, where a woman, possessed of lands, has been married more than once, and the lands, by the conception of the gift to her, are inheritable only by the children of the first marriage, the *birth of children of the second *[*166]* marriage will not entitle the husband of that marriage to be tenant of the lands by the curtesy; *(u)* so, on the other hand, if the lands be inheritable by the issue of a second marriage, and there be no issue of it, the

(m) Sumner v. Partridge, 2 Atk. 46.

(o) Co. Litt. 29, b.; Perk. 473.

(q) Thellusson v. Woodford, 4 Ves. 334.

(r) Whitelock v. Heddon, 1 B. & P. 243; Trower v. Butts, 1 S. & S. 181.

(s) Basset v. Basset, 3 Atk. 207; Goodtitle v. Newman, 3 Wils. 516.

(t) Co. Litt. 29, b.

(n) Co. Litt. 30; Dav. 50; 2 Sid. 153.

(p) Co. Litt. 29, b.

(u) Bro. Abr. 257, ss. 1, 8; Perk. 466.

husband of that marriage will not be tenant by the curtesy, though issue of the first marriage may be in existence. Again, if the wife's lands be given to her and the heirs *male* of her body, the birth of a daughter will not entitle the husband to the curtesy, nor, *è converso*, if the lands be given to heirs *female* of the body and a son should be born.(v) And, of course, if the gift should be so conceived as that the issue of the wife will not take the lands by *descent* from her, but as *purchasers*, or as primary objects of the donor's bounty, the husband will not be entitled to be tenant by the curtesy, inasmuch as the wife does not take any estate of inheritance at all for the issue to derive through her.(w)

§ 3.—*Incidents of the Estate of Tenancy by the Curtesy.*

Such being the different matters required in order to give a title to tenancy by the curtesy, the enjoyment of that estate is next to be considered. While tenancy by the curtesy is a continuance of the wife's estate, it is in some respects an independent estate for life in the husband. Viewed in either of these lights it confers rights and imposes liabilities upon the husband.

(a) *Incidents of Tenancy by the Curtesy as an independent Estate.*

(1) *Rights of the Tenant.*

As an independent estate for life, curtesy gives those rights which are incident to estates for life generally. *Thus, tenant by the curtesy is entitled to reasonable estovers or botes, i. e. the wood necessary [*167] for building and burning, and the general purposes of agriculture, as being necessary to the full enjoyment of the lands.(x) He is also entitled to emblements, or the fruits growing at the time of the determination of his estate,(y) the produce of seeds sown or roots planted by him; and, for the reason applicable to other tenants for life, that agriculture may not suffer through fear of the sudden determination of the possessor's estate, and the loss thereby of the crops sown by him. Tenant by the curtesy may, like other tenants for life, grant leases for years; but, as a necessary consequence of the limitation of his own estate, they will endure only so long as he himself lives. And if the lands should be a manor, the tenant by the curtesy is lord for the time, and may make copyhold grants.(z) In conclusion, it may be said generally, that the rights of tenant by curtesy, in the enjoyment of the lands subject to the curtesy, are the same as the rights enjoyed by ordinary tenants for life.

(2) *Liabilities of the Tenant.*

With regard to the liabilities to which tenant by the curtesy is subject, still viewing his estate as an independent estate for life, they are pretty

(v) Co. Litt. 29, b.
(x) Co. Litt. 41, b.

(w) *Sumner v. Partridge*, 2 Atk. 47.
(y) *Ibid.* (z) 4 Co. Rep. 23, b.

much the same as the liabilities to which ordinary tenants for life are subject. He is bound and may be compelled to keep down the interest of incumbrances upon the lands.(a) He is also liable for waste, in a suit at the instance of the heir, so long as the heir has not parted with the reversion, and that although the tenant by the curtesy may have granted over his estate, for privity of action between him and the heir will continue [168] nevertheless; but, if the heir part with the reversion, that privity will *be gone, and the grantee of the reversion can have waste only against the assignee of the tenant by the curtesy.(b) This subject of liability for waste will be treated more at large under the liabilities to which a dowress is subject; her liability in this respect being the same as that of the tenant by the curtesy.

(b) *Incidents of Tenancy by the Curtesy as a continuance of Wife's Estate.*

Viewed in the other light, which has been mentioned, as a continuance of the wife's estate, tenancy by the curtesy likewise gives some rights and imposes some liabilities. Thus, as an instance of the rights given, if an advowson had been held by the wife in coparcenary, and she had been the eldest sister, having right to the first turn of presentation to the church, should the church not become vacant until after her death, her husband surviving would have the right to present.(c) And, as an instance of the liabilities, if the lands were incumbered at the death of the wife, the enjoyment of the husband, as tenant by the curtesy, will be subject to such of the incumbrances as would have affected the wife's enjoyment;(d) and, before writs of partition were abolished by 3 & 4 Will. 4, c. 27, such a writ would have lain against tenant by the curtesy; and, by the 32 Hen. 8, c. 32, he or his alienee were entitled to sue out such a writ.(e) In equity, tenants by the curtesy, like other tenants for life, have the same rights in regard to partition as they have at law.(f)

[169] *§ 4.—*Circumstances affecting the Wife's Title to her Lands which will defeat the Title to Curtesy.*

Having now considered those things which are necessary in order to give a title to tenancy by the curtesy, and the rights which are given and the liabilities imposed in the enjoyment of that estate, the next subject to be considered is the circumstances which have the effect of defeating its enjoyment.

As tenancy by the curtesy is a continuance of the wife's estate, it is a necessary consequence that it must be co-existent with it, and that every thing which goes to defeat or extinguish her title to the lands has the same operation upon the title of the husband to the enjoyment of them by the

(a) *Snell v. Clay*, 2 Vern. 324.

(b) 2 Co. Rep. 23, b.

(c) *Harris v. Nichols*, Cro. Eliz. 18; Co. Litt. 166, b.

(d) *Casborne v. Scarfe*, 1 Atk. 609.

(e) Co. Litt. 175, b.

(f) *Baring v. Nash*, 1 Ves. & B. 555.

curtesy. If a stranger recover the lands upon a title prior to that of the wife, the curtesy will be defeated; but if the recovery be afterwards reversed, as obtained upon erroneous process, the title to curtesy will revive. Again, if a brother of the wife should be born after the death of her father and her entry to the lands, as her seisin will be defeated by the birth, so will the husband's title to curtesy. Should, however, the brother die without issue during the continuance of the coverture, and should the wife thereupon re-enter, as her seisin would be thereby revived, so would the title to curtesy. (g) If the wife, after seisin had, should endow her mother, in affirmance of a title in the mother, derived prior to the wife's marriage, the seisin of the wife would thereby become seisin of a reversion, dependent upon the mother's estate for life, which is not such a seisin as would support a title to curtesy; and in this way the husband's title to it would be defeated; but if the mother should die in the life of the wife, and she or *her husband in her right should thereupon re-enter, as the seisin of the wife would thereby revive, so would the husband's title [*170] to curtesy. (h) So, if a grant of lands to a married woman were defeasible upon a condition, if the condition be broken and the donor enter for the breach, he will do so upon his original estate. The seisin of the wife will thereby fail as if it had never existed, and with it will fall the right to curtesy. (i) If, however, the condition were fenced by a gift over, as this would in law be construed to be a limitation, and not a condition, the determination of the wife's estate and the consequent effect upon the husband's title to curtesy would depend, as is the case in regard to all limitations, upon the form of the condition viewed as a limitation. If, by the form of the limitation at its creation, the wife's estate is not made determinable sooner than it would be by natural expiration—i. e. her death, without issue surviving her—the husband will be entitled to curtesy, though by such death the wife's estate is at an end. (k) Whereas, if by the form of the limitation the estate is made determinable sooner than it would be by natural expiration, as if by words subsequent to the creation of the estate it is made determinable on the occurrence of a particular event, the right to curtesy will fail by the occurrence of the event. (l) Thus, if lands be given to A., a married woman, until B. attains twenty-one, and then to B. in fee, if B. attains twenty-one in the life of A., as the estate of A. is thereby determined according to the express words of the limitation, the right of A.'s husband to curtesy will be likewise determined.

While fines and recoveries were in use as modes of conveyance, if the husband and wife had joined in a fine or recovery of her land, the title of the husband to curtesy *would have been defeated at the same time [*171] that the wife's estate was extinguished, as the effect of either of these proceedings was to extinguish all existing estates. If, however, the wife had been under age at the time, and the fine or recovery had on that account been reversed, as the wife's estate would thereby have been revived, so would the husband's title to curtesy. (m)

(g) 2 Bro. Abr. 257, pl. 13.

(i) 22 Ed. 3, 19 B.; Co. Litt. 3. 5. 325.

(k) Paine's case, 8 Rep. 34; 1 Inst. 30, a.

(m) Charnock v. Worsley, Cro. Eliz. 129.

(h) Co. Litt. 31, a.

(l) Ray v. Pung, 5 B. & Ald. 561.

§ 5.—*Acts by the Husband which will bar his Title to the Curtesy.*

If, prior to the 8 & 9 Vict. c. 106, the husband, in the wife's life and *before* issue born, had aliened her lands by feoffment, the curtesy would have been barred, although he should have retaken an estate to himself and wife, whereby she would have been remitted to her former estate, and issue should afterwards have been born; for the feoffment operated a tortious discontinuance of the wife's estate, which extinguished all the husband's rights, present or future, and deprived him of any benefit from the remitter; (n) but now by the statute referred to it is declared, in its fourth section, that, after the 1st of October, 1845, a feoffment shall not have a tortious operation. The effect, therefore of the feoffment of the husband in the case supposed would now be simply to convey what was in the husband lawfully to convey, or to entitle the feoffee to hold the lands during the joint lives of the husband and wife. Even before the statute of Victoria, this would have been the effect of the husband's feoffment, if it had been made *after* issue born, because at the time of the feoffment he had an estate by the curtesy initiate, which could pass to the feoffee; (o) and a feoffment *at no [*172] time acted tortiously when it could have effect by right.

Now, that, by the abolition of fines and recoveries, (p) and the declaration that feoffments shall not have a tortious effect, (q) there is no mode of alienation left by which a husband can convey more than is lawfully in himself to convey, and the old learning in the books, upon the effect of the husband's alienation as a bar to his right to curtesy, may therefore be considered as nearly useless.

Although a wife, by leaving her husband and living in adultery, forfeits her right to dower, the like consequence of the same crime does not follow to the husband in respect of the curtesy. The statute 13 Ed. 1, c. 34, visited upon the wife's frailty the forfeiture of her dower; but the Legislature has not hitherto been careful to protect her against the vice of the husband by a similar forfeiture of his curtesy. (r)

If the husband should be attainted of treason, or other capital felony, he will forfeit his right to the curtesy, along with his other estates in fee or for life. If the attainder were for treason, the effect of a pardon would on principle seem to be to restore the husband to his right to curtesy, without regard to whether he had inheritable issue before or at the time of the attainder; for, as far as regards the curtesy, the attainder is only a personal disability, which the pardon has removed. (s) If the attainder be of felony, the matter is different; the effect of the pardon in that case depends upon the period at which the inheritable issue, entitling the husband to curtesy, was born. If the issue were born *before* the attainder, as the husband, by the birth of the issue, had already become tenant by the curtesy initiate, and [*173] *he was the sole tenant, the tenancy, after satisfaction of the Crown's forfeiture for year and day, would go, by the attainder, to the lord,

(n) Bro. Abr., Ten. per Curt. 6.

(p) By 3 & 4 Will. 4, c. 74.

(r) 13 Co. Rep. 23; Sidney v. Sidney, 3 P. Wms. 269-76.

(s) 15 East, 463; 13 Rep. 23; Co. Litt. 33.

(o) Co. Litt. 30, a.

(q) By 8 & 9 Vict. c. 106.

who might thereupon enter; and the right thus acquired by him could not be affected by the pardon, the effect of which would be confined to remission of the Crown's right for year and day alone, and so the right to curtesy would be taken away by the attainder.^(t) But, if no inheritable issue were born at the time of the attain, the wife, and not the husband, would be at that time the tenant, bound to do homage to the lord, so that the husband's attainder could not create any escheat to the lord *defectu tenentis*; the Crown, therefore, would be entitled to the rents so long as issue were unborn, and this right the pardon would remit; and, with the remission, would revive the right to curtesy.

§ 6.—*Acts by the Wife which bar the Right to Curtesy.*

But the curtesy may be barred by the acts of the wife as well as of the husband; for if she be attainted of treason *before* issue born, this will bar the right to curtesy, inasmuch as the wife is, as yet, the sole tenant; and this effect will not be removed by the subsequent birth of issue, for, by the previous forfeiture, they can never inherit, and so tenancy by the curtesy cannot arise. On the other hand, the curtesy would not be barred if the attainder of the wife should not take place until *after* issue born, for then the husband would already have become tenant of the lands, as tenant by the curtesy initiate.^(u)

These observations, however, in regard to the effect of the wife's attainder upon the curtesy, apply only to attainder *for high and petit treason and murder, or abetting, procuring, or counselling the same; for, [^{*174}] in regard to attainder for all other crimes, it is declared by 54 Geo. 3, c. 145, that it shall not prejudice the right or title of any person other than the offender, during his natural life, and shall not disinherit the heir. This last provision saves corruption of blood, and, by consequence, escheat to the lord, who can only claim it *pro defectu tenentis*.^(v) The pardon of the wife for any of the crimes excepted from the operation of this statute of 54 Geo. 3, where it is given *before* issue born, will not save the curtesy, should issue be born after the attain, as before observed; for, by the attainder, the issue could never inherit.

If the curtesy be claimed of lands acquired by the wife after pardon, or after the attainder has been reversed, the claim will be good.^(w)

(t) Co. Litt. 351.

(u) Hale's P. C. 359.

(w) Co. Litt. 392, a.

(v) Hawk. P. C. 486.

CHAPTER IV.

POWER OF THE HUSBAND TO BIND OR AFFECT THE REAL PROPERTY OF THE WIFE.

THE estate which the law gives the husband in the lands of the wife, for his own enjoyment, having been treated of, the power which he has by law to bind or affect the estate continuing in the wife after celebration of the marriage is next to be considered.

The most important right of this nature, at least the one of most frequent occurrence, is the power of the husband to *grant leases of the wife's [*175] lands. This right exists, first, at common law ; and, secondly, under the statute 32 Hen. 8, c. 28.

§ 1.—*Power of the Husband at Common Law to lease the Wife's Lands.*

Although the statute of Hen. 8 has made leases valid which would not have been so previously, it is, nevertheless, material to consider the law as it existed prior to that statute, because that will still regulate cases where the lease does not come within the provisions of the statute.

The real property of the wife, in which, before the marriage, she had an absolute unqualified right, is, during the coverture, under the power and regulation of the husband alone. She cannot, therefore, grant a lease of her lands without his concurrence. A lease made by her without his consent would be simply void ; but the power of the husband does not extend beyond the period of the coverture. A lease, therefore, made by him alone, or by him, in conjunction with the wife, of a longer endurance than the coverture (subject to the observations to be afterwards made on the 32 Hen. 8, c. 28,) is determinable by the wife after the death of the husband. (a) If the lease by the husband be for the life of the lessee, the wife may avoid it by action after the husband's death, as a discontinuance of her estate. (b) If it be for years, or for the life of the wife, she may determine it by entry or by action.

Where the lease has been made by the wife, in conjunction with the husband, she will confirm it, if, after her husband's death, she accept from the tenant rent payable *under the lease : (c) unless, indeed, the lease [*176] was by parol and for years ; in that case it was void ab initio, for want of a writing to manifest the wife's consent, and cannot be confirmed by acceptance of rent or otherwise. (d) In Bro. Abr. (e) a distinction is drawn where the lease has been made by the husband alone, without the wife ; in that case it is said : " Although the lease be in writing, the wife will not confirm it by accepting rent after the husband's death." If the wife marry a second time, and, before she have exercised her election to agree or dis-

(a) Roll. Abr. 349, Y and Z ; Bro. Abr. p. 3, ss. 6 and 10.

(b) Vide post.

(d) Dyer, 91 b ; 146 b.

(c) Doe v. Weller, 7 T. R. 478.

(e) Acceptance, 6.

agree to the lease, her second husband accept rent from the tenant, that acceptance will affirm the lease and bind her.(f)

If, prior to the statute abolishing fines and recoveries, the wife had joined with the husband in levying a fine, or had alone, after his death, levied a fine, she would be barred from disagreeing after the husband's death to any lease which might have been executed by him or by her in conjunction with him during the coverture; and so also with the conusee of the fine; for the right of election, originally competent to the wife, is not transferred by the fine.(g) If the lease were by parol and for years, as it was void against the wife, so will it be void against the conusee, who therefore may enter notwithstanding.(h)

What has been said in regard to a joint lease by husband and wife being voidable, and not absolutely void, so far as she is concerned, is at variance with the rule that the deed of a married woman is void; but the case is a special exception to that rule, and is allowed for the sake of agriculture and tillage.(i) In the case in the note, the exception was *not allowed; because the deed, though in form a lease, was for a long term, and [*177] had in fact been granted as a mortgage, so that protection to agriculture was no way concerned.

The right to agree or disagree, after the death of the husband, to leases granted by him, is not confined to the wife personally: it may be exercised by those who claim under or in privity with her; but it cannot be exercised by those who claim paramount to her, as by a joint tenant surviving her. In such a case the lease of her moiety is good against the surviving cotenant, under the ordinary rule, that a lease for years by one of two joint tenants is good against the other tenant surviving.(k)

Prior to the Statute of Frauds,(l) if a joint lease by husband and wife of the wife's land had been made by parol to endure for her life, it was good till she defeated it by entry, because it began by livery, and could only be defeated by entry;(m) and this, whether she had accepted rent or not;(n) but if the lease was for years, it was void against the wife ab initio, and incapable of confirmation by her acceptance of rent after the husband's death.(o) But now, by the Statute of Frauds, all leases exceeding the term of three years, must be in writing and signed by the parties.

As a parol lease for years, by the husband and wife together, is void by the Statute of Frauds for want of her consent, because that consent can now only be manifested by writing, it would seem to follow that a lease for years, though in writing, if made by the husband alone, should be void also; and so it is said to be by Brooke.(p) But the better [*178] opinion, confirmed by the preamble to the 32 Hen. 8, c. 28, seems to be, that such a lease is not void, but only voidable, and may be voided by the entry of the wife or some one in privity to her.(q) Whether acceptance of

(f) Anon., Dyer, 159.

(g) Cadee v. Oliver, 3 Leon. 154.

(h) Harvey v. Thomas, Cro. Eliz. 216.

(i) Goodwright v. Straphan, Cowp. 204.

(k) Smalman v. Agborow, Cro. Jac. 417. In the Report it is said the baron and feme let the "money," which, on the margin of the copy in Lincoln's Inn Library, is altered to "land;" but, on the authority of Littleton, sect. 289, the alteration should be to "moiety."

(l) 29 Car. 2, c. 3.

(m) Bro. Abr. Barre, 27.

(n) Dyer, 91 b, and 146 b.

(o) Ibid.

(p) Bro. Abr. Leases, 24.

(q) Jordan v. Wikes, Cro. Jac. 332; Smalman v. Agborow, Id. 417; Dixon v. Harrison,

rent by the wife, after the husband's death, would confirm a lease in writing made by the husband alone, is a question of some doubt. In Brooke(r) it is said, that acceptance of rent will not bind the wife. Serjt. Williams(s) suggests, that the conflict, which certainly exists among the old authorities, may be reconciled by distinguishing between leases for life and for years; that the former, commencing by livery, can only be defeated by entry; whereas the latter are absolutely void upon the death of the grantor. The reason assigned in Dyer(t) why a parol lease for life by husband and wife is altogether void, is, that when the wife parts with her land, the intent and consideration should be expressed in writing to prove her consent, and writing being wanting, the lease is void. This reason is very unsatisfactory, as it would equally apply to make leases *in writing* by the husband *alone* void; whereas, as already shown, they are only voidable. Bacon draws attention to this, and suggests a reason for the distinction between these two kinds of leases in this respect, that, as the inheritance continues in the wife, notwithstanding the husband's right of administration, if the husband does nothing to discontinue or divest the inheritance out of her, his charges fall off upon his death, which determines his power and interest; but a lease for [*179] years in writing is a disposition of the land from which *no variation can be attempted after the husband's death; and, in favour of agriculture, the law allows such a lease effect until the wife dissents to it; whereas there is nothing to evidence the terms of a lease by parol, and it is therefore denied effect.(u) It may be, likewise, that, from the nature of the husband's seisin in the wife's lands, it may reasonably follow, as a consequence, that any estate created by him, though exceeding the period of his own beneficial interest should continue good until avoided by action or entry.(v)

§ 2.—*Statutory Power of the Husband and Wife to make Leases of the Wife's Lands under the 32 Hen. 8, c. 28.*

By this statute, so far as regards the subject of Husband and Wife, it is enacted, "that all leases hereafter to be made of any lands, tenements, or other hereditaments by writing, indented under seal, for term of years or for term of life, by any person being of full age of twenty-one years, having any estate of inheritance, either in fee simple or in fee-tail, in their own right or jointly with their wives, of any estate of inheritance made before the coverture or after, shall be good and effectual in the law against the lessors, their wives, heirs, and successors, and every of them, according to such estate, as is comprised and specified in every such indenture of lease, in like manner and form as the same should have been if the lessors thereof and every of them, at the time of the making of such leases, had been law-

Vaugh. 40; Goodright v. Straphan, Cowp. 201; Perry v. Hindle, 2 Taunt. 180; Hill v. Saunders, 2 Bing. 112.

(r) Bro. Abr., Acceptance, 1; Id. Barre, 27.

(s) Wotton v. Hele, 2 Saund. 180, n. 10.

(u) Bac. Abr. Leases, C. 1.

(t) 91 b, and 146 b.

(v) 2 Saund. 180, n. 10.

fully seised of the same lands, tenements, and hereditaments comprised in such indenture, of a good, perfect, and pure estate of fee simple thereof to their own only uses.

"Provided always, that this act or anything contained shall not extend to any leases to be made of any *manors, lands, tenements, or hereditaments, being in the hands of any fermor or fermors by vir- [*180] tue of any old lease, unless the same old lease be expired, surrendered, or ended within one year next after the making of the said new lease (2), nor shall extend to any grant to be made of any reversion of any manors, lands, tenements, or hereditaments (3), nor to any lease of any manors, lands, tenements, or hereditaments which have not most commonly been letten to farm, occupied by the fermors thereof, by the space of twenty years next before such lease thereof made (4); nor to any lease to be made without impeachment of waste (5); nor to any lease to be made above the number of twenty-one years, or three lives at the most, from the day of making thereof (6); and, that, upon every such lease there be reserved yearly during the same lease, due and payable to the lessors, their heirs and successors, to whom the same lands should have come after the deaths of the lessors, if no such lease had been thereof made, and to whom the reversion thereof shall appertain, according to their estates and interests, so much yearly ferm or rent or more, as hath been most accustomably yielden or paid for the manors, lands, tenements, and hereditaments so to be letten within twenty years next before such lease thereof made (7); and that every such person and persons to whom the reversion of such manors, lands, tenements, or hereditaments so to be letten shall appertain as is aforesaid, after the death of such lessors or their heirs, shall and may have such like remedy and advantage to all intents and purposes against the lessees thereof, their executors and assigns, as the same lessor should or might have had against the same lessees (8). So, that, if the lessor were seised of any special estate tail of the same hereditaments at the time of such lease, that the issue or heir of that special estate shall have the reversion rents and services reserved upon such lease after the death of the said lessor, as the lessor himself might or ought to have had if he had lived.

*"Provided always, that the wife be made party to every such lease which hereafter shall be made by her husband of any manors, [*181] lands, tenements, or hereditaments being the inheritance of the wife (2); and that every such lease be made by indenture in the name of the husband and his wife, and she to seal to the same (3); and that the ferm and rent be reserved to the husband and to the wife and to the heirs of the wife, according to her estate of inheritance in the same (4); and that the husband shall not in anywise alien, discharge, grant, or give away the same rent reserved, nor any part thereof, longer than during the coverture, without it be by fine levied by the said husband and wife (5); but that the same rent shall remain, descend, revert, or come after the death of such husband unto such person or persons and their heirs, in such manner and sort, as the lands so leased should have done if no such lease had been thereof made."

These provisions are to be strictly construed; any omission of their requisites, therefore, will vitiate the lease and cannot be supplied in equity, however meritorious the consideration for it may have been; for this power to

lease being a legal one, Courts of equity must, in the construction of the power, follow the law.(w)

(a) *Property demisable under the Statute.*

The property which a husband alone in right of his wife, or jointly with her, is allowed to demise, is manors, lands, tenements, and hereditaments, out of which a rent may be reserved. Things, therefore, that lie in grant, as advowsons, fairs, markets, franchises, and the like, are not demisable under the statute.(x) Tithes, however, are an exception to this, although they do lie in grant; because, as was said, they are a tenth part of the [*182] profits of the land, *are tangible and visible, and have every property of an inheritance in lands. A lease of tithes, therefore, *for years*, with reservation of the customary rent, will be good under the statute, because it will support an action of debt at common law for the rent reserved, and will therefore go with the reversion and bind the assignee of the lessee.(y) And so, now, in a lease *for lives* of tithes, although, as no such remedy prior to the statute 5 Geo. 3, c. 17, was given upon this kind of lease, it was not valid until this statute of Geo. 3, put both classes of leases upon the same footing.(z)

(b) *Surrender of Prior Leases.*

The statute requires that the subject of the lease shall not be in the possession of any lessee, by virtue of any prior lease, unless the same be expired, surrendered, or ended within one year of the making of the new lease.

A surrender of the old lease, upon condition that the surrender shall be void if the new lease is not granted, will satisfy the statute and support the new lease.(a) The surrender, in order to be effectual, must, in compliance with the statute, be by deed or note in writing, or "by act and operation of law." Cancellation will not be a surrender,(b) neither will verbal permission to the tenant to leave the premises.(c) But acceptance by the lessor of a new tenant and distraint upon him for rent, will operate as a surrender of the old lease;(d) and acceptance of the key of premises by the lessor, the lessee quitting the premises and never after entering them, will take away the lessor's action for rent for the period subsequent to his receiving the key.(e) But notice by a lessee to the lessor of his having given possession [*183] *of the premises under lease to a lessee from an intending purchaser of the fee, and his having given up possession accordingly, and not having been called upon by the lessor for rent for a period of three years, was held not to deprive the lessor of his action against the original lessee for rent subsequent to the period of his having given up possession.(f) The recital in a new lease, that it was given partly in consideration of the sur-

(w) *Darlington v. Pulteney*, Cowp. 267.

(y) *Talentine v. Denton*, Cro. Jac. 111.

(a) *Wilson v. Carter*, 2 Str. 1201.

(c) *Mollett v. Brayne*, 2 Camp. 103.

(d) *Thomas v. Cooke*, 2 B. & Ald. 119.

(e) *Whitehead v. Clifford*, 5 Taunt. 518.

(x) Co. Litt. 44, b., and 47, a.

(z) *Ibid.*

(b) *Berkley v. York*, 6 East, 101.

(f) *Matthews v. Sawell*, 8 Taunt. 270.

surrender of a prior one, will not operate as a surrender, if in its terms it do not purport to be such a surrender.^(g) The making of a new lease to the same lessee, while the original lease is yet current, will be a surrender of the original lease.^(h) It will not, as it seems, therefore, form any objection to the new lease, that it is not to take effect till a period subsequent to its date, because immediately upon its taking effect the original lease will ipso facto determine; but the new lease, which is to operate as a surrender of the first, must be good to pass the interest it purports to grant, otherwise it cannot have that operation. As if a tenant for life, with a power of leasing at the best rent that can be got, grant a lease in execution of this power, at an under rent, to a tenant already holding by lease from the maker of the estate for life, this new lease, in itself void, as made in breach of the power, will not operate as a surrender of the original lease.⁽ⁱ⁾

(c) *Reversionary Lease.*

The statute likewise requires that the lease shall not be of any reversion. As the doctrine with regard to the validity of leases granted under private powers, prohibiting reversionary leases, is the same as the doctrine upon the *validity of leases granted under a similar statutory power, the same [*184] authorities will serve for both.

The statute requires that the lease shall not be in reversion, but in possession; and, in a subsequent part of the section, that it shall not exceed twenty-one years or three lives from its date. If a lease be made to take effect in possession, according to the power given by the statute, but for a period which will expire within the period allowed, a second lease, made either at the same or at a subsequent time, to commence upon the expiration of the first lease, though for a period which, added to that contained in the first, will not exceed the whole period allowed, will be void, as a lease in reversion.^(k) It is obvious, therefore, that a single lease granted in reversion, though for a period not exceeding twenty-one years or three lives from its date, will be void. A lease of a certain date, not to take effect till a certain subsequent date, will be allowed to take effect as a lease in possession, if in fact it be not executed by the parties until the day on which it is to take effect.^(l) But a lease to take effect from its date as to part of the premises, and, after its date, as to the remainder, will be void in toto, though it may have been made according to the custom of the country.^(m)

If the lease have no date, or an impossible one, as 31st of February, it will be held to commence from the time of delivery;⁽ⁿ⁾ or, if the date be inserted, and the habendum do not specify when the possession is to commence, it will in like manner be held to commence from the time of delivery.^(o) And whether it be with or without a date, it will also commence from the time of delivery, where the habendum is from the making or from

(g) *Berkley v. York*, 6 East, 86.

(h) *Thomson v. Trafford*, Poph. 8; *Fulmerston v. Steward*, Plow. 106; *Berkley v. York*, ubi supra.

(i) *Berkley v. York*, ubi supra.

(k) *Pulteney v. Cavan*, 5 T. R. 567; *Sutton v. Harvey*, 1 B. & C. 426.

(l) *Cox v. Day*, 10 East, 427.

(m) *Co. Litt.* 46, b.

(n) *Ibid.*

(o) *Ibid.*

[*185] "henceforth."(p) *If the habendum be "from the date," or "from the day of the date," the day will in either case be included, so as to make the lease one in possession, and not in reversion. The contrary was at one time held, but the law is now definitively settled in the way stated,(q) unless, indeed, there be something in the words used to show that the intention of the parties was to exclude the day.

(d) *Lands to be commonly let.*

The statute requires that the manors, lands, tenements, or hereditaments let shall have been most commonly let or occupied by the lessee for twenty years before the date of the lease. It is not necessary, to satisfy this provision, that the lands should have been let throughout the twenty years; it is sufficient, that, in the course of that period, they have been let on more than one occasion, though for a short term,(r) or that they have been let for one long term, as for eleven years, being more than the half of the twenty.(s) It was at one time argued, that copyhold grants could not come within this provision of the statute, which, as was said, referred to grants by indenture only; but the contrary was afterwards ruled, as an estate by copy is an estate at will, and lands demised at will are lands accustomedly let, within the terms of the statute.(t)

(e) *Lease not to be without Impeachment of Waste.*

The statute requires that the lease shall not be without impeachment of waste. It is not necessary, in order to deprive the lease of the benefit of the statute, that it should in express terms be without impeachment of waste; it is *sufficient if it be so expressed, as that that consequence [*186] must follow, from the application of the general rules of law to the terms in which it is conceived. Thus, if a lease were made to A. for life, remainder to B. for life, remainder to C. in fee, C., in the life of B., could not have action for waste committed by A.(u) The lease, therefore, giving effect to the provisions of the statute, would not be within its protection. A lease for the lives of three persons will not be in this predicament; for, should the lessee die in the life of the cestui que vies, an action of waste would lie against the occupant for waste committed during their lives.(v)

(f) *Duration of the Lease.*

The statute requires, that the lease shall not be made "above the number of twenty-one years, or three lives." It has been held, that, if the lease be for lives, it may be either to one person for the lives of three others, or to three for their own lives;(w) and, arguing

(p) Co. Litt. 46, b.

(q) Pugh v. Leeds, Cowp. 714.

(r) Tristram v. Baltinglass, Vaugh. 33; 2 Roll. Abr. 261.

(s) Co. Litt. 44, b.

(t) Dean of Worcester's case, 6 Co. Rep. 38, a; Baugh v. Haynes, Cro. Jac. 76; Banks v. Brown, Moore, 759.

(u) Paget's case, 5 Co. Rep. 76, b.

(v) Dean of Worcester's case, 6 Co. Rep. 37, b.

(w) Baugh v. Haines, Cro. Jac. 76.

by analogy from what has been decided in regard to leases under private powers, it would seem that the lives chosen must be of persons in esse at the making of the lease; "the candles must be all burning at the same time."^(x) If the lease be for years, it will of course be within the statute, if the period of years be below twenty-one. Where a private power allowed leases for lives, "or for the term of twenty-one years," the Court held a lease for a period under twenty-one years to be within the power.^(y) As the statute gives validity to leases "for term of years or for term of life," selection must be made of the one or the other kind of lease, where it is desired to take the benefit of the statute. There cannot be subsisting at the same time leases for years and leases for *lives.^(z) It would seem, therefore, that a lease compounded of the two would not be [*187] within the power; for, under a private power allowing leases for any term not exceeding twenty-one years, or for one, two, or three lives, it was held that a lease for ninety-nine years, determinable on three lives, was not within the power.^(a) It should be observed, however, that where the power is not, like that in the statute and in the case referred to, limited by a subsequent proviso, as that the leases to be granted shall not exceed three lives or twenty-one years; in that case a lease for a term, not exceeding the number of years allowed, but determinable by the running out of lives within the number allowed, will be sustained as within the power.^(b)

(g) *Rent reserved upon the Lease.*

The statute requires, that there be reserved upon the lease "so much yearly rent or more, as hath been most accustomably paid, within twenty years next before such lease." Learned authorities have differed, as to what is to be considered the accustomed rent. Hale, C. B., in *Morrice v. Antrobus*,^(c) held that it was the rent reserved upon the last lease, where that differed from the rent reserved upon the first; for the first, having been altered, could not be called the accustomed rent; and Holt, C. J., in *Orby v. Mohun*,^(d) speaking of a private power, agreed with Hale's opinion; whereas Cowper, L. C., in the same case, differed, and said, if there were two leases at a rent, and a third at a lesser rent, he would not hold the two to be at the ancient rent. The expressions of the statute seem to point neither at the highest nor at the lowest rent which may have been obtained, nor the first nor the last; but at what *had usually been taken; [*188] and in this acceptance Lord Cowper seems to have viewed it. The statement of the questions which have arisen, in regard to what is meant by "accustomable rent," suggest an observation, the propriety of which these questions render very obvious, viz. that it will not satisfy the provisions of the statute, that the lease contains a reservation of rent, in *ipsis* verbis of the provision itself; for, in that case, what was intended for the benefit of the wife and her heirs might prove the very reverse. Under such a reservation, it would be impossible to declare in an action against the lessee, upon any certain sum, without being under the necessity of proving

(x) *Windham v. Halcombe*, 7 T. R. 723.

(y) *Isherwood v. Oldknow*, 3 M. & S. 382.

(a) *Roe v. Frideaux*, 10 East, 158.

(c) *Hard*. 325.

(z) 5 Co. Rep. 2, a.

(b) *Whitelock's case*, 8 Co. Rep. 70, b.

(d) *Gilb*. Rep. 53.

that that sum was the accustomed rent, at the risk of the lessee's proving the reverse.^(e) It will not be any objection, however, to a lease under the statute, that the rent reserved is not one definite precise sum, if it be reserved in such terms as put it within the power of the lessor to ascertain the precise sum, as where so much money per acre is made payable, because the number of acres may be ascertained.

If the accustomed rent, whatever it be, is payable in any particular medium, that medium should be adhered to in the lease under the statute, otherwise a prejudice might arise to the wife or her heirs, by a depreciation in the value of the medium, adopted in lieu of that which had been in use; payment in silver, therefore, cannot be substituted for one in gold.^(f) But if the annual payment in the accustomed medium has been reserved, it will not form an objection to the lease, that some payment, *not annual*, but casual, has not been reserved, for the terms of the statute are "*yearly rent*;" thus the omission of a heriot or fine on the death of the lessee, will [*189] not avoid the lease.^(g) If, however, the *customary leases have reserved the enjoyment of any part of the premises leased, as of "all crab trees and such like trees," the omission of this reservation in the new lease will avoid it under the statute, although the accustomed rent should have been reserved; for more is let than anciently, and the wife and her heirs cannot, during the lease, have the benefit of the boughs and fruits *yearly* renewing.^(h) Besides, a portion of the rent reserved is ascribable to this excess in enjoyment by the lessee, over that under the ancient leases, and so the ancient rent, though in terms, is not in fact reserved.⁽ⁱ⁾ A lease of lands, which had never previously been let, will be void under the statute, although the rent reserved should be the utmost that could be got.^(k)

According to the express terms of the statute, the rent is to be "*reserved yearly*." If, therefore, the payment under the lease be yearly, it will be immaterial whether it is to be made at one or at several times within the year.^(l)

A lease, embracing by one joint demise lands, which had been formerly demised, as required by the statute, and lands which had never been demised, will be void;^(m) but if the demise be several, or if there be a several reservation of rent for each of the parcels, the lease will be good as to the lands customarily demised, the rent reserved as to them being the customary rent.⁽ⁿ⁾ If the demise should be several of the two kinds of lands, but the reservation of rent joint, not distinguishing the portion reserved in respect of each, the lease will, it is apprehended, be void, under the statute, as to the whole, and for obvious reasons.

If lands, which have usually been demised separately, be joined in one [*190] demise, at a single rent for the whole, and *payable out of the whole, which is equal to or even exceeds the rent anciently reserved for the lands separately, the lease will not be good under the statute,^(o) as

(e) *Owen v. Thomas*, ap. *Rees*, Cro. Car. 94; *Orby v. Mohun*, Pre. Ch. 257.

(f) 5 Co. Rep. 5 b.

(g) 6 Co. Rep. 38 a.

(h) *Smith v. Bole*, Cro. Jac. 458.

(i) *Mountjoy's case*, 5 Co. Rep. 5 b.

(k) *Doe v. Yarrowburgh*, 1 Bing. 24.

(l) 6 Co. Rep. 38 a; *Cock v. Younger*, Cro. Car. 16.

(m) *Doe v. Rendle*, 3 M. & S. 99; *Doe v. Mathew*, 2 N. & M. 264.

(n) *Tanfield v. Rogers*, Cro. Eliz. 340.

(o) *Mountjoy's case*, 5 Co. Rep. 5 b.

it appears; though it is not easy to discover the reason in any prejudice suffered by the wife or her heirs. It would be more obvious, that, if the rent reserved in the case last stated, were payable only out of a portion of the lands, the lease should be bad, because the security for payment of the ancient rent is diminished, in proportion to the extent of the lands withdrawn from liability, but no case has as yet decided this question. If, however, part only of the lands anciently demised be leased, and the rent reserved be the ancient rent for the whole, the lease will be good. (p)

It was at one time supposed, that if part only of the lands anciently demised were leased, and a proportional part of the ancient rent were reserved, corresponding to the portion leased, that the lease would nevertheless be bad; and authorities were cited (q) for a position apparently so impolitic. It was overlooked, however, that in the case cited from Coke's Reports, this question was not in issue; and that Coke elsewhere (r) had stated the law to be the very contrary; shewing, as Bayley, J., said, (s) either that there was a mistake in the report of Mountjoy's case, or that the opinion of the profession was against the doctrine there laid down. The case of Doe v. Wilson has established the validity of such a lease.

In conclusion, upon the subject of leases, granted by husbands of the lands of their wives, it must be observed, that, although such a lease may be void, so far as its validity may be rested upon the 32 Hen. 8, c. 28, because the requisites of that statute have not been complied with, [*191] it may nevertheless be good as a demise at common law, open to be avoided or confirmed by the wife, at her election, a subject which has been treated of before. (t)

With regard to the leases of the lands of married women, granted by their husbands under powers contained in private deeds, as their validity does not depend upon the rules of law applicable to the relation of husband and wife, but upon the rules applicable to the construction and execution of such powers, the subject is not one proper to be treated of in a work confined to the law in regard to the particular relation of husband and wife. It would not only be superfluous, because ample information upon the subject of powers is to be obtained in the works on that branch of the law; but it would be injurious, because it is apt to mislead the student into the idea, that what he is reading is confined to the execution of private powers, by husbands alone, while it is in fact applicable to the execution of them by mankind generally. Although, therefore, this subject is very fully considered by Boper in his learned work, it is omitted here.

§ 3.—*Power of Husband to charge the Real Property of the Wife.*

Continuing the subject of the rights of the husband in the real property of the wife, his power to charge it with debts contracted by himself will now be considered.

(p) *Threadneedle v. Lynam*, 2 Mod. 57; S. C., 3 Keb. 595.

(q) *Mountjoy's case*, 5 Co. Rep. 5 b; Touchet. 279.

(s) *Doe v. Wilson*, 5 B. & Ald. 390.

(r) Co. Litt. 44, b.

(t) *Ante*, p. 175.

As marriage gives the husband an estate in the lands of the wife, which is limited in its endurance to his own life, where there has been issue of the marriage, and to the joint lives of himself and the wife where there has not been issue, a charge created by the husband upon the lands will be effectual to bind the estate that is so in him; but it will not *be effectual to [*192] bind the rights of the wife surviving, or of her heir, unless she have been a party to the creation of the charge; for, whatever may have been the incapacity of a married woman to deal with her personal property, yet, anomalous as it may appear, she has, in regard either to aliening or charging her *real estate*, all the powers of a feme sole, with this qualification only, that what she does must be done with the consent of her husband, and with the observance of certain judicial procedure, which the law has prescribed, in order to ensure that what she does is done with full knowledge of her right, and of the nature of the act, and not under the pressure of undue influence from her husband. But a charge for the debts of the husband, effected by a procedure or deed, which, for its validity, depends upon the consent given to it by the wife, a consent which she is at perfect freedom to give or refuse, cannot, in proper acceptation, be said to be an exercise of the husband's powers over the wife's real property. But, as will afterwards be seen, when speaking of the powers retained by a married woman over her real property, notwithstanding the marriage, if, while fines and recoveries were yet in use, she had joined the husband in levying a fine, or suffering a recovery of her lands, and he alone had declared the uses of the fine or recovery, the uses so declared would have bound the lands, unless she by some act in pais dissented, because, by having joined the husband in the fine or recovery, it was presumed, until the contrary was shewn, that she had also joined with him in an agreement as to the uses.(u) In this way the husband may be said to have had power to create a charge upon the lands of the wife, which should bind the fee; but, so far as regarded the fee, it was a charge defeasible by the dissent of the wife to the declaration of uses of *the fine intended to give the proceeding the effect [*193] of a charge. However, whether the wife assented or dissented to the declaration of uses made by the husband, the uses declared by him bound his own life estate in the lands, and, so far, the charge was indefeasible.(v)

Another method by which the husband may attempt to create a charge upon the lands is, by granting a lease of them for a term of years. When this is done, the Courts of equity will disregard the form of the instrument used, and look to the substance; they will treat it as a mortgage, and not a lease. If it were to be treated as a lease, the instrument would not be void, as against the wife surviving; but would only be voidable by her, if she had not done anything after the husband's death to bar that remedy.(w) But, viewed as a mortgage, the instrument will be actually void as against the wife surviving, unless after the death of the husband she have done acts amounting to delivery of it as a charge.(x) How far the acts which occurred in the case cited at foot would, in the present day, be regarded as amounting

(u) Beckwith's case, 2 Co. Rep. 57 a; Swanton v. Raven, 3 Atk. 105. See post, as to how this presumption might be rebutted.

(v) Beckwith's case, Moore, 196.

(w) Vide ante, p. 177.

(x) Goodright v. Straphan, Cowp. 201.

to delivery of the deed, may be worth considering; but the authority of the case, as making the charge effectual against the wife, was plainly rested upon the fact of delivery of the deed by the wife, after the death of her husband. If the acts done by the wife do not amount to delivery of the lease as a charge, but are more of the nature of a confirmation of it qua lease, such as acceptance of rent, and the like, it must be remembered, as already stated(y) that the admission of these acts to validate a lease against a married woman surviving her husband, which otherwise would have been void, was grounded upon favour to agriculture only, and will not therefore, be permitted to set up against her a deed, which, though in form a lease, is in truth *a mortgage.(z) In the case just referred to, there were acts of the wife, which, if the deed in question had been treated as a [*194] lease, would have amounted to confirmation of it by the wife; but they were disregarded, because the deed was treated as a mortgage and not a lease.

It has been supposed(a) that the decision in *Drybutter v. Bartholomew* is opposed to that in *Goodright v. Straphan*; but this seems to have arisen from misapprehension of what fell from the Bench in the first of these cases, which did not amount to more than that the deed in question was not a lease, but a mortgage; that the subject affected to be leased (New River shares) was an incorporeal hereditament, not capable of being leased; and that a fine was the proper method to have been adopted, in order effectually to bar the estate of the wife. It is worthy of observation, that neither in *Goodright v. Straphan*, which is cited to shew that acceptance of rent would validate a charge by lease, nor in *Drybutter v. Bartholomew*, which is supposed to conflict with it, was there any acceptance of rent, for none was reserved in either case. These cases, therefore, instead of conflicting, seem to support each other, and, so far as they go, establish the doctrine which has been stated at the outset of this section.

The copyhold lands of the wife may be charged during the coverture by the surrender of the husband and wife, she being examined apart from the husband as to her knowledge of what she is doing, and her freedom of consent, if there be a custom authorising her to alien by surrender.(b) But a surrender by the wife, without the assent of the husband, will be void, although there should be a custom sanctioning such a surrender; because such a custom, as tending to make wives independent of their husbands, is contrary to the law and policy of the nation.(c)

*The power of the husband alone to affect the lands of the wife, beyond the life-estate which he takes in them by the marriage, with [*195] charges for debts contracted by himself, is therefore very limited, and does not amount to more than a power to do that which, in the utmost exercise of it, is defeasible by the dissent of the wife after his death. The subject of his power to create charges over the freehold lands of the wife, *with her consent*, will be reserved till the power of the wife over her own real property comes to be considered.

(y) Ante, p. 176.

(z) *Rop.* 138.

(c) *Stevens v. Tyrell*, 2 Wils. 1.

(x) *Drybutter v. Bartholomew*, 2 P. Wms. 127.

(b) *Dyer*, 363 b.

§ 4.—*Right of Wife to Exoneration, out of Husband's Property, of Charges upon her Lands.*

Assuming that the lands of the wife have been well charged, during the coverture, in one or other of the ways which have been noticed, they will be exonerated out of the assets of the husband, if the charge has been made for the purpose of raising money, either for paying off debts of the husband, or for his necessities in other ways.

In *Tate v. Austen*,^(d) this exoneration of the wife's estate was postponed to the debts of the husband, though it was preferred to his legacies; and, in *Clinton v. Hooper*,^(e) Lord Thurlow said, the cases obliged him to put the matter as if between heir and executor, because assumpsit could not be raised between husband and wife more in equity than at law. But, as observed by Mr. Jacob, in a note to *Roper*, vol. 1, p. 145, if this reason were conclusive, it would be difficult to say why the wife should, in any case, be entitled to claim the exoneration. Moreover, there is this evident distinction between the case of the wife and an heir, that she claims by a title paramount to her husband, *and free from any liability for
[*195a] his debts; whereas the heir claims under the husband, and with liability for his debts. Accordingly, where the heir claims from the executor exoneration, out of the personal estate of his ancestor, of mortgages of the real estate, should the personal estate, after this, be insufficient for the discharge of the ancestor's other debts, the personal creditors are entitled to stand in the place of the mortgagee, and to take out of the real estate the deficiency of the personal estate occasioned by the exoneration of the real estate. This circuitous mode of ascertaining the several liabilities results in obliging the heir to make good out of the real estate any deficiency of assets for payment of his ancestor's debts, because he takes the ancestor's estate under the ancestor. But, as already observed, the wife does not take her estate under her husband, but paramount to him, and free from any liability for his general debts. If, therefore, she is entitled to exoneration, out of her husband's personal estate, of a charge created by him on her real estate, there is no principle upon which the creditors of the husband, in case of a deficiency of the personal estate to pay their debts occasioned by this exoneration, could be entitled to stand in the place of the creditor in the charge, and to claim this deficiency out of the wife's real estate.

Roper thinks that it was because the creditors cannot have this benefit, as against the wife, that the wife's claim to exoneration was, in *Tate v. Austen*, postponed to the debts of the husband, which was in effect placing the wife, as against the creditors, in the same position as the heir would have been in. No reason, however, is assigned in that case why this was done; and probably it was that case which, in *Clinton v. Cooper*, induced Lord Thurlow to say that the cases obliged him to put the question in the same way as between heir and executor. But, in *Tate v. Austen*, the case
[*195b] *of the wife was made to differ from that of the heir; for she was preferred to the *legatees* of the husband, whereas the rights of the heir are postponed to those of *legatees* as well as creditors.

The position, therefore, that the wife's right to exoneration out of the

(d) 1 P. Wms. 264.

(e) 1 Ves. jun. 188.

husband's estate is similar to that of the heir of the husband out of his personal estate, is opposed to several decisions, which will be noticed immediately, and leads to inconsistencies and difficulties in principle hard to be reconciled; whereas, if the lands of the wife be considered to stand as surety for the money charged upon them for the use of the husband, and she is considered entitled to exoneration like any other surety, the case becomes easy in principle, and consistent with several cases which have not as yet been noticed. This seems to be the true way of putting it. In *Parteriche v. Powlet*,^(f) Lord Hardwicke said, that a woman, paying her husband's mortgage-debt out of her separate estate, was entitled to stand in the place of the mortgagee equally with a stranger; and that if she joined with her husband in charging her own estate, she was, in like manner, entitled to stand in the place of the mortgagee, and to be satisfied out of the husband's estate. In *Robinson v. Gee*,^(g) the same judge says, that, in the case last suggested, in *Parteriche v. Powlet*, the wife is entitled to have her real estate exonerated out of her husband's personal and *real* assets, the Court considering her estate only as a *surety* for his debt, and none of *his* creditors have a right to stand in the place of the mortgagee, to come round on the wife's estate. In *Kinnoul v. Money*,^(h) Lord Camden says, "The general principle is, that where husband and wife raise money out of the wife's estate, *with reversion to the one or to the other, the Court [*195c] inquires into the uses, considers them as two persons, and, if he might use the expression, dissolves the marriage quoad the transaction: though the husband covenanted to pay, and gave bond, the application determined who was the principal and who was the surety." In *Aguilar v. Aguilar*,⁽ⁱ⁾ a fund, which the husband was entitled to *jure mariti*, was applied in payment of an annuity charged upon the separate estate of the wife, and also upon this fund, and that as against not only the husband, but his assignee, under the Insolvent Act, and persons to whom he had subsequently again charged the fund.

The more correct doctrine seems, therefore, to be, that, when the wife's estate is charged for money raised to the use of the husband, the wife is in the situation of a surety for the husband, and entitled, like other sureties, to the benefit of any securities against the husband's estate, and to have satisfaction of her debt, according to its rank with his other debts.

If the debt were the wife's, contracted *dum sola*, it will not by the marriage become the husband's, so as to entitle her to exoneration out of his estate, even although he should after the marriage have joined with her in creating the charge upon her estate, or in assigning a charge which had been created by her previous to the marriage, and covenanted in either case to pay off the money. The debt, which was originally the wife's, will continue to be hers, and the charge will take effect out of her estate alone;^(k) and the same will be the case if only part of the money charged upon the lands was the debt of the wife prior to marriage: that portion will continue her debt; but for the other portion of the debt, contracted after marriage, for

(f) 2 Atk. 384.

(h) 3 Swanst. 217, n.

(k) *Bagot v. Oughton*, 1 P. Wms. 347; *Kinnoul v. Money*, 3 Swanst. 202; *Pitt v. Pitt*, 1 T. & R. 180.

(g) 1 Ves. sen. 252.

(i) 5 Madd. 414.

[*195d] *the use of the husband, her estate will be entitled to exoneration out of the husband's.(l)

If, either prior to the marriage or subsequent to it, and at the same time with the creation of the charge, a settlement have been made of the wife's estate, it will be presumed that the settlement and the charge are one transaction, and that the lands of the wife were intended to be charged for the money borrowed, especially if the loan were made to pay any of the wife's debts or charges upon her estate, and though more money may have been raised than was sufficient for that purpose. As the transaction is single, the intention of the parties will be presumed to have been uniform—to charge the wife's estate for the whole of the money; and she will not, therefore, be entitled to exoneration of it out of the husband's estate for the excess of the loan over the amount of her own debts and charges.(m)

If the fact of whether the money raised was for the use of the husband, or of the wife, does not appear from the deed to lead the uses of the fine by which the charge may have been created, that fact, as would appear from the reference made in *Kinnoul v. Money*, to inquire what money was raised for payment of the wife's and the husband's debts respectively, may be proved aliunde.

When the whole form of the transaction shews an intention to raise the money out of the wife's estate, as a gift to the husband, and not as a means of supplying his occasions or necessities, the debt will not be the husband's: he had an original right to it, without any obligation to repay it.(n) But the fact of gift, or no gift, if it do not appear from the instruments themselves, cannot be proved by parol declarations of the wife to that effect,(o) though *probably the actual application of the money, whether in payment of her own debts, or in some way different from paying the money to her husband, might be proved by her parol declaration.(p)

Though, in the mortgage of the wife's estate, the equity of redemption should be reserved to the husband, this will not enlarge his rights. The mere form of reservation is not of itself sufficient to alter the title, and, fraud being out of the question, the form is supposed to have originated in inaccuracy or mistake, to be explained or corrected by the previous state of the title. If the only evidence, therefore, of intention rests on the reservation of the equity of redemption to the husband, he will be entitled to the equity of redemption precisely to the extent to which he was previously interested in the legal estate of the lands; ultra, that there will be a resulting trust in him for the wife and her heirs.(q) But the prior ownership, and the purpose of the deed, so far as it purports to effect a mortgage, are only elements in the interpretation of the deed. If other circumstances occur, shewing an intended alteration of rights, they will receive effect, and the deed will operate according to its terms. Thus, if the mortgage be created by a term, and in the same deed there is a limitation of the fee of the lands in favour of the husband, having no connexion with the proviso for redemption of the term, this will operate against the construction, founded

(l) *Earl of Kinnoul v. Money*, 3 Swanst. 202, n.

(m) *Lewis v. Nangle*, 1 Cox, 240.

(o) *Ibid.*

(n) *Clinton v. Hooper*, 1 Ves. jun. 188.

(p) *Ibid.*

(q) *Broad v. Broad*, 2 Ch. Ca. 161; *S. C.* as *Brend v. Brend*, 1 Vern. 213; *Ruscombe v. Hare*, 6 Dow. 1.

upon the previous ownership, of a resulting trust for the wife.^(r) Whereas, if the whole structure of the deed shew only an intention to create a security to the creditor, its operation will not be *larger, and the equity [*195f] of redemption will belong to the wife surviving, although the estate of the creditor may have become absolute at law in the lifetime of the husband.^(s)

If the wife disclaim intention to seek exoneration out of her husband's estate, and induce his executor to administer his assets, upon the footing that no such claim will be asserted, she will be held to have waived her equity to the exoneration. This was held, even where all the legacies given by the husband, with the exception of two small ones, had been already paid by the executor, before the disclamation by the widow.^(t)

CHAPTER V.

ALIENATIONS BY HUSBAND OF WIFE'S FREEHOLD LANDS.

§ 1.—*Power of Husband to alienate.*

As the estate in the wife's lands, which is given to the husband by the marriage, is limited to one for his own life, it is obvious that he has no power to do of himself any act which should have the effect of aliening them from the wife; yet the history of the law shows that the attempt has been made, and that it did not in certain circumstances fail of success. This, however, can no longer be done; for, by the abolition of fines and recoveries,^(a) and the statutory *declaration^(b) that feoffments shall not have a tortious operation, and^(c) that no discontinuance, to be made after [*196] the 31st of December, 1833, shall toll or defeat any right of entry or action for the recovery of land, there is no mode of conveyance left, by which the husband can alien more than the estate, which the marriage may have given to himself in the lands of the wife, viz. an estate for their joint lives, in case there should not have been issue of the marriage, or for his own life, in case there should have been issue.

Nevertheless, as cases may arise for some time to come upon the law, as it existed prior to the passing of the statutes which have been mentioned, it will be necessary to show what that law was.

Such was the unity of person and interest supposed to exist in the relation of husband and wife, that, according to the common law, until it was altered by a statute to be presently noticed, if the husband aliened the lands of the wife during the coverture, the alienation was so far treated as made

(r) Rowell v. Walley, 1 Rep. in Chan. 116; Jackson v. Innes, 1 Bl. 105.

(s) Clark v. Burgh, 2 Coll. 230.

(t) Clinton v. Hooper, 1 Ves. jun. 188.

(a) 3 & 4 Will. 4, c. 74.

(b) 8 & 9 Vict. c. 106.

(c) 3 & 4 Will. 4, c. 27, s. 39.

by one having a legal title, that it operated as a discontinuance of the wife's estate. The consequence of this was, that, upon the death of the husband, the wife could not enter, as she otherwise might have done, upon a disseisor or one in possession without a title, but she was put to her action, as she would have been against the heir of the disseisor, possessing on the *ex facie* title of descent.^(d) By the statute 4 Henry 7, c. 24, if the alienation by the husband had been made by a fine *with proclamations*, the wife's right of action against the alienee for recovery of the lands was barred, unless she brought it within five years from the time of her husband's death.

[*197] § 2.—*Statutory Remedy against Husband's Alienation of Wife's Lands by her Entry.*

By the 32 Hen. 8, c. 28, the remedy of the wife was changed. The sixth section of that statute declared, that no fine, feoffment, or other act or acts to be made, suffered, or done by the husband only, of manors, lands, tenements, or hereditaments, the inheritance of the wife, should be a discontinuance, or be prejudicial to her or her heirs; but that she might enter to the hereditaments notwithstanding.

Under this statute of Hen. 8, if the husband and wife, having been seised to them and their heirs of an estate made during the coverture, the husband should have made a feoffment in fee to another, the wife, upon the death of the husband, might have entered into the lands, even although she should have joined with the husband in making the feoffment; for, in substance, such a feoffment was, by reason of her disability, the act of the husband alone.^(e) And if the alienation had been by deed of bargain and sale enrolled, in which the wife had joined, she might, notwithstanding, have entered and pleaded *non est factum* as to the deed.^(f) But if the alienation had been made by fine, whereunto the wife was party or privy, she could not have entered, such a fine being specially excepted by the statute. Indeed, her entry would have been barred if the alienation had been by feoffment, followed by joint fine of husband and wife, for the two were considered as one assurance, and, the joint fine being excepted by the statute, the bar took effect.^(g)

The statute 32 Hen. 8 speaks only of fines; it does not include a fine with proclamations; therefore, if the mode of alienation adopted had been [*198] by fine with proclamations, to *which the wife was not a party, the case continued to be governed by the statute of Hen. 7, to which allusion has been made,^(h) by which it was necessary, as already observed, for the wife to avoid the estate of the conusee by action brought within five years from the death of her husband.⁽ⁱ⁾

If, by reason of *precontractus*, the marriage had been dissolved, after the husband had aliened lands held by him in right of the wife, the wife, upon

(d) Litt. sect. 594.

(e) Co. Litt. 326, a.

(g) King v. Edwards, Cro. Car. 320.

(i) Co. Litt. 326, a.; Dyer, 72 b.

(f) 10 Co. Rep. 43.

(h) Ante, p. 196.

the divorce, might have entered under the statute of 32 Hen. 8, because, at the time of the alienation, she was *de facto* the wife of the alienor.^(k)

The remedy given by the 32 Hen. 8 was not derivative from the wife to others than her heirs, as to the lord coming in her right. Thus, if, after the alienation by the husband, the wife had died without heirs, although, had she survived him, she would have been entitled under the statute to enter notwithstanding the alienation, the lord had not that right, as coming in her stead for default of heirs, for the remedy was confined to those having right at the period of the alienation, which the lord had not.^(l)

If the alienation by the husband had been only for the life of the alienee, as this was at the common law a discontinuance of the wife's estate, against which she was entitled to the writ *cui in vitâ*, she was in such case entitled under the statute to enter upon the alienee.

All entries given by the statute 32 Hen. 8 are subject to the rules of the common law, applicable to entries generally. There cannot, therefore, be any entry under the statute where entry is *tollèd* at the common law. It is doubtful, however, whether, prior to 3 & 4 Will. 4, c. 27, which, in its 39th section, declares that no descent cast after the 31st of December, 1833, shall toll any right *of entry or action for the recovery of land, if the feoffee of the husband had died in his lifetime, and the lands had descended [*199] upon the feoffee's heir, the entry of the wife upon the husband's death would have been tolled by the prior descent cast upon the feoffee's heir. If the case had been one in which the husband himself might have entered in his life, such as disseisin suffered by the husband, the wife's entry on his death would not have been tolled by the descent cast,^(m) because, as is said, no laches of the husband shall turn the wife nor her heirs to any prejudice in such case. Whether the same would hold where the husband had, through his own act of feoffment, no right to enter during the covertures, does not appear from the Books; but it must be remembered, that, by the 32 Hen. 8, c. 33, where the descent was cast upon transmission to the heir of a disseisor, the right of entry of the party then entitled to enter was not taken away unless the disseisor had had peaceable possession for five years after the disseisin committed, without entry or continual claim.

Copyhold lands were neither within the letter nor the equity of the statute 32 Hen. 8.⁽ⁿ⁾ They were not within the letter; for the words of the act have reference to a common-law estate and the common-law mode of conveyance. And they could not be within the equity; for, if the statute had been extended to them, and the party had been allowed to enter, there would have been a tenant without the assent or admittance of the lord, which cannot be.^(o) But the application of the statute to copyholds was not required; for, according to the law peculiar to lands of this tenure, a surrender passes only what the surrenderor may lawfully part with; the surrender, therefore, by a husband of his wife's lands, as it did not pass more than was in the *husband, could not operate as a discontinu- [*200] ance of the wife's estate.^(p) She was, therefore, entitled to enter

(k) Co. Litt. 326, a.

(l) Stanhope v. Lincoln, Hob. 243; Duncombe v. Wingfield, Id. 261.

(m) Litt. sect. 403.

(n) Bullock v. Dibley, Moore, 596.

(o) Gilb. Ten. 178.

(p) Bullock v. Dibley, Moore, 596; Knight v. Footman, 1 Leon. 35; 4 Co. Rep. 23, a.

after his death, notwithstanding the surrender, although the contrary was said by Walmsley, J., in *Collins v. Cancke*.^(q) How far a surrender would operate as a discontinuance of copyhold estate, where the custom of the particular manor authorises such an effect, at one time admitted of doubt. In *Bullen v. Grant*^(r) it was held that it would so operate; and from what was said by the Court arguendo in *Erish v. Rives*,^(s) and is laid down in *Dalison*,^(t) it would seem to have been considered as so operating against a married woman. In truth, the ancient authorities, which were all reviewed in *Carr v. Singer*,^(u) are very conflicting in regard to the operation of a surrender; but, according to the judgment in that case, which was that a surrender by a tenant in tail of copyhold lands would bar the estate tail, a surrender would not have operated as a discontinuance of the estate in copyhold lands. But if a surrender by a husband of the wife's copyhold lands could in any case have worked a discontinuance of her estate in them, it is as yet an open question whether she would not in that case have been within the benefit of the 32 Hen. 8, c. 28, and might not have entered, upon her husband's death, without being put to bring her plaint, in the nature of a real action, in the lord's court.^(v)

[*201] *§ 3.—*Common Law Remedy against Husband's Alienation of Wife's Lands by her Remitter.*

Independently of the statute 32 Hen. 8, c. 28, a married woman was not without remedy by the common law in certain cases against the effect of a discontinuance of her estate, while that could have been worked by the husband's alienation of her lands, which, as before observed, it cannot now be. This remedy she had by the common law doctrine of Remitter, which, in its general application, prior to the Statute of Uses, to be afterwards noticed,^(w) had reference to two classes of cases: first, where a person had a perfect right to lands recoverable by action alone; and, secondly, where he had such a right, coupled with a right of entry, without the necessity of action.

(a) *Where right recoverable by Action alone.*

According to the general doctrine of remitter, if the right of a married woman to lands had been recoverable by action alone, should a defeasible estate of freehold in them have been cast upon her, and should she, or her husband in her right, have entered by virtue of the title so cast upon her, the law remitted her to that title, or put her in the same condition as if she had recovered the land against *another* upon her prior title, because

(q) Cro. Jac. 105.

(r) Cro. Eliz. 148.

(s) Id. 717.

(t) Page 116, pl. 8.

(u) 2 Ves. sen. 603.

(v) Rowden v. Maltster, Cro. Car. 43; Gilb. Ten. 184.

(w) Post, p. 204.

she could not have brought an action against herself to establish her prior indefeasible title.(x)

Though a man may elect whether he will be remitted to his prior right or hold under a new title acquired by him, a married woman could not do this either by herself or by her husband; for, eo ipso, upon the acquisition of the new title, remitter operated to defeat it and revest in her her ancient *title; and the law would not allow the husband by his disagreement to divest the estate so regained, and revest, it might be, a [*202] wrongful title, not only because of the injury which might thereby be wrought to the married woman, but because remitter is favoured in law, as tending to the advancement of ancient rights.(y)

And, in the case of a married woman, it did not make any difference that the new title was not cast upon her, but acquired by her own act or consent or that of her husband, as by immediate purchase. This, in the ordinary case, would prevent remitter, for the purchase would be treated as a waiver of the prior right,(z) and would form a bar to action on that right. But a married woman had the benefit of her disability from coverture, and, therefore, if a feoffment had been made to her, having already a prior indefeasible title, she was remitted to that title.(a) This exception in favour of a married woman gave rise to another in favour of the husband himself. Thus, if, by prior title, husband and wife had been tenants in tail special of lands, should the husband in any way have discontinued that estate, and afterwards taken to himself and the wife a new estate in tail special, the taking of this new estate was regarded as the act of the husband, not of the wife, and she, as has been said, was remitted to her prior estate; but the necessary consequence of this was likewise to remit the husband, because the wife took the new estate along with him in entirety, and not in moieties.(b)

Littleton says, "A married woman will not be remitted if the new estate has been gained by disseisin with her covin and consent, because she is then a disseisoreess;"(c) *but Coke(d) says "A married woman cannot be a disseisoreess, unless by her own proper act;" and the cases in [*203] Viner,(e) though conflicting in some respects, seem to confirm Coke's doctrine. If, however, the two estates (the prior estate and the new one) both came to a married woman during her coverture, she might, after the death of her husband, have elected which of them she would take, provided she did not thereby injure any third party; for the possession and the right did not unite in her until after the death of the husband.(f) But if the wife took the prior estate before marriage, and the new estate alone came to her during the coverture, she could not, after the termination of the coverture, elect between the two estates, for the same reasons that have been given why the husband could not oust her remitter by his disagreement to the new estate: by operation of law, the wife, immediately upon the vesting of

(x) Litt. sects. 659 and 661.

(y) Litt. sect. 677; Co. Litt. 357, b., and 358, a.

(z) 3 Bl. Com. 20.

(b) Co. Litt. 353, b., and 354, a.; Litt. sect. 672.

(d) Co. Litt. 357, b.

(f) Co. Litt. 357, a.; Hob. 71.

(a) Litt. sect. 677.

(c) Sect. 678.

(e) Abr. Disseisoreess, D. E. F.

the new estate, was remitted to her ancient estate, and the new estate was, eo ipso, defeated.^(g) If the exercise of her right of election by a married woman, of two waivable estates, would prejudice third parties, as, for instance, persons entitled in remainder, it was not allowed; and, in that case, she was invariably remitted to the prior of the two estates.^(h)

(b) *Where Right recoverable by Entry as well as Action.*

Remitter, as was said,⁽ⁱ⁾ applies also where the party has not only the right of property and of possession, but is in a position to clothe these rights by actual entry. But the case of a married woman afforded here also an exception to the application of this part of the general law of remitter, so far as regards the effect which was given to the Statute of Uses. In the [*204] ordinary case, if a party, having a right of *entry, gain by his own act the possession from the party who had the naked possession without right, as disseisee from disseisor, he is remitted to his ancient right, although the manner of his obtaining the possession should have been by taking from the disseisor, in the case instanced, an estate for life, in tail, or in fee;^(k) provided the estate taken was by deed poll, for such deed is the deed of the feoffor, lessor, or donor only.^(l) If, however, the new estate so gained were by a conveyance with limitation to the party's use, the doctrine of remitter could not have application, because, by the operation of the Statute of Uses,^(m) the conveyance would give him the same estate in the lands as it gives him in the use, which, by consequence imports that he shall not take any other estate; whereas, if the doctrine of remitter were to apply, he would take under the conveyance a very different estate from that limited to him by the use. The effect, therefore, of the Statute of Uses is, in the general case, to exclude the application of remitter to discontinued titles, where the new estate is given by a limitation to uses.

But the case was altogether different where the party having right under the discontinued title was a married woman, for she was entitled, by the 32 Hen. 8, c. 28, as has been seen,⁽ⁿ⁾ to an entry upon the death of her husband, notwithstanding any act done by him, which, in regard to the husband himself or another, would have operated as a discontinuance; so that she claimed to re-enter, not upon a discontinued estate, but of an estate which gave her a lawful right of entry; and as, upon lawful re-entry, she was entitled to be remitted, so where a new estate was conveyed to her and was in her, though it should be by the application of the Statute of Uses to the conveyance, she was entitled to elect which of the two estates she would [*205] take, that to which she was entitled *to re-enter under the 32 Hen. 8, c. 28, or that which she had gained by the conveyance, qualified, as it was, by the Statute of Uses: *Duncombe v. Wingfield*.^(o)

The statute of 32 Hen. 8, therefore, was virtually a repeal, as to a married woman, of the Statute of Uses, so far as regarded estates discontinued by her husband; for, upon her entry after his death, or their joint entry

(g) Co. Litt. 357, a.

(i) Ante, p. 201.

(l) Gilb. Ten. 129; Co. Litt. 263, b.

(n) Ante, p. 197.

(h) Hob. 255.

(k) Gilb. Ten. 129; Litt. s. 693.

(m) 27 Hen. 8, c. 10.

(o) Hob. 256.

during his life, though under a conveyance with limitation to uses, she was entitled to be remitted to her prior estate; and, as a common law incident of remitter, all the remainders dependent upon her estate were likewise remitted.^(p)

According to the doctrine laid down in *Duncombe v. Wingfield*,^(q) the first section of the Statute of Uses applies to the first taker of every several estate, as well in remainder as in possession; where, therefore, the new estate is limited by way of use, the first taker will not be remitted to his prior estate, if any such there be, but will be left to his right of action. The statute, however, is satisfied by the application of it to the first taker alone; if, therefore, he leave issue, as they come in by descent, their rights will be regulated by the common law, and they will be entitled to the benefit of remitter to the prior estate. If the first taker leave no issue, then the next taker will be affected by the statute, and will not be entitled to be remitted, although his issue, if he leave any, will be so entitled. So soon, however, as any taker leaves issue, who will be entitled to be remitted, then all the subsequent takers will be freed from the operation of the statute, for remitter of an estate has, as a common law incident, the effect of remitting all subsequent estates dependent upon it.^(r) It must be remembered, therefore, that, if any of the takers had been *a married woman, she would have been in the same situation as any other person, unless [*206] the limitation to uses had been the act of her husband; for the stat. of 32 Hen. 8, gives her a right of entry only where the discontinuance has been his act, not where it has been the act of other parties.

§ 4.—*Alienation and Forfeiture of Wife's Copyhold Estate by Husband.*

The power of the husband over the copyhold lands of the wife, so far as he can affect them by alienation or forfeiture, requires a separate consideration.

With regard to alienation, it has already been observed,^(s) that a surrender (the proper mode of conveyance of copyhold lands) by the husband will not operate as a discontinuance of the wife's estate in copyholds, because a surrender is what is called an innocent assurance, and does not pass to the surrenderee any other estate than the surrenderor has in himself.

In the ordinary case, if the heir or devisee of a copyholder do not come to be admitted, on being so required by the lord, the latter, if there be a custom to that effect, may seize as for a forfeiture, or, without such a custom, he may seize quousque, i. e. until the heir come in and sue for admittance, unless, indeed, the heir be abroad or incapacitated.^(t) In this way, it might be supposed that a husband, by refusing to have his wife admitted to her copyhold lands, would occasion their forfeiture or seizure; but, by special statute,^(u) these consequences did not attach to a *feme coverte, where she took by descent or under a surrender to the use [*207]

(p) Hob. 254; Litt. s. 673.

(q) Hob. 254.

(r) Ib.

(s) Ante, p. 199.

(t) Tarrant v. Hellier, 3 T. R. 162; Gilb. Ten. 231.

(u) 9 Geo. 1, c. 29; re-enacted by 1 Will. 4, c. 65.

of a will; for, in such case, it was declared, that she might be admitted either personally or by her guardian, and that, in default of the appearance of her or of her guardian for that purpose, the lord might appoint a guardian to take admission for her, and might then set such a fine as would be legal if she were sole; and that, if this were not paid, the lord might enter upon the lands or retain possession, until, by the rents, the fine was paid. If the feme covert had not been entitled, by descent or under a surrender to the use of a will, the two cases specially mentioned in the statute, it seems questionable, whether, even in such a case, notwithstanding what was said by Lord Eldon in *Kensington v. Mansell*,^(v) the lord could have done more than seize quousque, notwithstanding a custom allowing him to seize as for a forfeiture, because the 5th section of 9 Geo. 1, expressly declares that no married woman shall forfeit her copyholds for neglect, or refusal to be admitted, or to pay the fines imposed upon her, any custom to the contrary notwithstanding. But now, by the 1 Will. 4, c. 65, the statutory relief of a married woman against the effect of the husband's refusal to have her admitted, is no longer confined to her taking by descent or under a surrender to the use of a will; for, by this statute, the refusal will not in any case operate as a forfeiture of her estate.

In grants of copyholds, there is an implied condition that the copyholder will abstain from all acts ruinous to the estate, destructive of the tenure, or tending to deprive the lord of any of his rights. Any act, therefore, by a husband, in breach of this implied condition, will operate at common law to forfeit the wife's estate, not only during the husband's life, but after his [*208] decease; for it does not seem that *a married woman is exempt from these conditions; and as, by her marriage, she put her estates into the management of her husband, she must be bound by his acts. Accordingly, where the husband of a tenant for life of a copyhold committed waste against the custom of the manor, and died, it was found that the estate of the wife was utterly forfeited.^(w)

As the making a feoffment of copyholds with livery of seisin,^(x) (or levying a fine of them while that mode of conveyance was in use,) divests the lord of his right, the use of that mode of conveyance draws after it a forfeiture of the tenant's estate. On the other hand, though the husband convey the estate, if he do so by deed, which passes only his own interest, and does not affect either his wife or the lord's right, as a lease and release, or bargain and sale, this will not operate as a forfeiture of the wife's estate, for these forms of conveyance operate under the Statute of Uses; and a copyholder, being only a tenant at will, is not seised to an use, so as to admit the operation of the statute; and, moreover, if the statute were to *transfer* the possession to the use of a copyhold, as it would do so without the allowance of the lord or the agreement of the tenant, this would introduce a tenant without the lord's consent, a consequence not sanctioned by the general words of the statute.^(y) As nothing, therefore, passes by a bargain and sale but a use, there is no forfeiture of the wife's estate by the exercise of that mode of conveyance by her husband.

(v) 13 Ves. 240.

(w) *Clifton v. Molyneux*, 4 Co. Rep. 27 a.; Roll. Abr. 509—40.

(x) Co. Litt. 59, a.; Roll. Abr. 538—12; *Taverner and Cromwell's case*, 3 Leon. 109.

(y) *Coke*, Cop. s. 54; *Gilb. Ten.* 182; *Cro. Car.* 44.

If the husband of a copyholder make a lease for years of the copyhold lands without license and against the custom of the manor, it will work a forfeiture of his own estate; *but upon his death the wife surviving will have the lands again, notwithstanding the forfeiture.(z) This, [*209] as observed by Roper, is apparently an exception to the general principle of the husband's power over the wife's estate to bind it by such deeds as are effectual in law. Jacob, in his note to this passage, does not attempt to give an explanation of the deviation. He merely quotes the reason assigned in Roll. Abr. 509, that the lease is a tort to the feme as well as to the lord, and therefore it is not reasonable it should be a forfeiture of her estate. The reference in Rolle is to an old case,(a) where no mention is made of the reason assigned by Rolle; but a distinction is drawn in it by Dodderidge, J., which, although not noticed in any of the subsequent cases, is worthy of observation. He says, if a feme copyholder take a husband who makes a lease for years without license, it is a forfeiture, because it is her folly to take such a husband as will forfeit her land; but, where a copyhold is granted to a feme coverte, and the husband maketh such a lease, it is no forfeiture; and, in an earlier case,(b) which is so stated as to shew that the wife was a copyholder prior to marriage, the majority of the Court seem to have viewed the lease for years as inferring a forfeiture. The reader will observe, that, in the distinction which has been noticed, there is a close analogy with the law in regard to the wife's remitter (c) Nevertheless, it must be observed that the distinction is rejected by Gilbert in his Tenures.(d)

Another implied condition of the copyholder's estate is, that he will perform all the services prescribed by the custom; and a refusal to perform these will infer a forfeiture *of the estate.(e) As the lord must always have such a tenant as may be sufficient to answer all de- [*210] mands, and is not concerned with the agreements of third parties,(f) if the husband of a feme copyholder refuse to perform the services, this refusal will infer a forfeiture of her estate.(g)

(z) *Saverne v. Smith*, Cro. Car. 7; 8 Rep. 44 b.

(a) Godb. 344.

(b) *Hedd v. Chalener*, Cro. El. 149.

(c) Ante, p. 201.

(d) Page 243.

(e) *Hedd v. Chalener*, Cro. Eliz. 149; *Crisp v. Fryer*, Cro. Eliz. 505.

(f) 1 *Strange*, 454.

(g) *Hedd v. Chalener*, Cro. Eliz. 149.

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BOOK V.

RIGHTS OF THE WIFE ACQUIRED BY THE MARRIAGE IN THE
PROPERTY OF THE HUSBAND.

CHAPTER I.

RIGHTS OF THE WIFE IN THE PROPERTY OF THE HUSBAND—DURING THE
COVERTURE.

SUCH being the rights which the husband acquires by the marriage in the property of the wife, the subject which naturally falls to be next considered involves those rights which the wife acquires in the property of the husband, either by the marriage or by the gift of the husband—a subject which may be considered with reference to two periods, the subsistence of the coverture and after its termination.

During the subsistence of the marriage, the person of the wife, as has been already observed, (a) is sunk as it were in that of the husband. The marriage has not only the negative effect of depriving the wife of any power of action to bind even her own estate, but it operates actively, as has been also observed, to make a gift to the husband of all her personal property, not previously settled by herself or others to her separate use, to be enjoyed by him during the coverture. It will, therefore, be anticipated that the [*212] wife does not by the marriage acquire any right in the personal property of the husband, to be enjoyed at least during the coverture, and while she is subject to the disability which it creates. The only exception from this is in regard to the paraphernalia of the wife, so far as they are the gift of the husband. While the person of the wife is, as it were, sunk in that of the husband, so as to prevent her enjoyment, independently of or in opposition to him, of property to which she has an absolute unqualified right, she is nevertheless considered as having an independent existence so far as to be competent to possess and enjoy what is necessary for her own personal comfort and ornament. If the rule of law, that marriage is a gift of the personal property of the wife to the husband, were carried to the extent of giving to him the same right in her personal ornaments and clothing which is given to him in her other property, the necessary consequence would be the recognition of a right in the representatives of the husband to strip the wife upon his death of all these things. The law has, however, provided against such a shock to decency and propriety by introducing an exception from the gift by marriage in regard to the “paraphernalia” of the wife. This term, in its original derivation from the Greek, means something brought besides, (b) and, in its application to

(a) Ante, p. 9.

(b) Passow's Lexicon, Παρά την γυναίκα.

this subject, has been explained to embrace "*res quas uxor in usu habet in domo mariti neque in dotem dat,*" or "*quas mulieres extra dotem inferunt in domum viri*"(c)—something which the wife brings into her husband's house, not as a part of her dowry, but as necessary to her own personal comfort. By the law of England, however, the term "*paraphernalia*" is applied to all clothing and ornaments which the wife possessed at the time of the marriage, not given to her *eo intuitu* by her parents or friends, or which have been given to her by the husband during the **coverture*,(d) and which are suitable to her condition in life, as, for ex- [213] ample, a peasant would not be entitled to a gold chain as part of her paraphernalia.(e) If the articles have been given to the wife by her parents or strangers, upon the marriage or during the coverture, they will not be paraphernalia, but will be treated as given to her separate use.(f)

It is not necessary, in order to bring articles within the term "*paraphernalia*," that, when given by the husband, they should have been delivered over by him to the continuous custody of the wife. It will be sufficient, that, though kept in his own care, they have been given by him to her to be worn upon suitable occasions.(g) On the other hand, if there be evidence, that, although the husband allowed the wife to wear the articles, he did not intend them to be considered as paraphernalia, they will not be treated as such. Evidence of this import was held to exist in the circumstance of the husband having by will, executed before marriage, given jewels to his heir by a prior marriage, to go as heir-looms; and the effect of this gift, as precluding the character of paraphernalia, was not considered to be rebutted by the fact of the husband, after marriage, having altered the setting of the jewels and added stones of great value.(h)

Such being the meaning of the term "*paraphernalia*," the rights of the husband and wife, in regard to the property coming within its meaning, are different from their rights in regard to any other personal property. As to the husband, his right is very similar to that of the husband under the *communio bonorum*, known in the civil law and **in* some of the countries of modern Europe. During the coverture he has an absolute [214] right of administration, and may sell or give away the paraphernalia gratuitously,(i) and, in case of his being indebted, they will be subject to the execution of his creditors;(k) but he cannot continue his administration after death, or bequeath them by will.(l) On the other hand, the wife has merely the use of the paraphernalia during the coverture, subject to the husband's right of administration, and cannot dispose of them, as she may of her separate estate; but upon the husband's death she is entitled to them as her absolute property, unaffected by any gratuitous disposition by

(c) De Lauriere in *Glos. Jur. Gall.*

(d) *Slanning v. Styles and Mangey v. Hungerford*, 2 Eq. Ca. Ab. 156.

(e) *Bindon's case*, Moor. 213 and 2 Leon. 166; *Hastings v. Douglas*, Cro. Car. 343; *Offley v. Offley*, Pre. in Ch. 26.

(f) *Graham v. Londonderry*, 3 Atk. 392.

(g) *Northey v. Northey*, 2 Atk. 77; *Graham v. Londonderry*, ubi supra.

(h) *Calmady v. Calmady*, 11 Vin. Abr. 181.

(i) *Seymour v. Tresilian*, 3 Atk. 358.

(k) *Snelson v. Corbet*, 3 Atk. 369; *Ridout v. Plymouth*, 2 Atk. 104.

(l) *Tipping v. Tipping*, 1 P. Wms. 730; *Northey v. Northey*, 2 Atk. 77; *Marshall v. Blew*, 2 Atk. 217.

him, not intended to take effect till then; and she will be entitled to claim them or their value as a debt owing from his estate.(m)

Although, where there is a deficiency of funds, the claim of the wife to her paraphernalia will be postponed to the right of the husband's creditors for payment of their debts, yet the claim is so much of the nature of a debt, as has just been said, that it is preferred to that of legatees, who take only of bounty.(n) Prior to the 3 & 4 Will. 4, c. 104, if the specialty creditors of the husband had exhausted his personal estate in payment of their demands, the widow was allowed in equity to stand in their place, and to have her claim, in respect of her paraphernalia, satisfied out of her real estate, after the simple contract creditors had been satisfied in the same way;(o) and that, whether the lands were in the possession of the heir or of a devisee, under a charge for payment of debts, or were freehold or copyhold. Whether the widow had this right against a devisee, where there was no charge for [*215] payment of debts, is more *doubtful. Now that lands of every kind are alike assets for payment of debts, by the statute which has been referred to, it may be presumed that they will be assets for satisfaction of the widow's claim to paraphernalia.

If there should be an insufficiency of assets for payment of the husband's debts, either at the time of his death, or at the time of the paraphernalia being applied to payment of the debts, which, as before mentioned, they are liable to be, it will not be an objection to such application that there are contingent assets which may fall into possession at a future indefinite period, when, perhaps, the widow may be dead, and so the end and design of paraphernalia be defeated. In such a case, the paraphernalia will be applied, in the meanwhile, in satisfaction pro tanto of the debts; and even if the contingent assets should afterwards fall into possession, the widow will not be entitled to compensation in respect of them.(oo) If the husband have, by will, given the wife a legacy of the paraphernalia, in the case supposed, that, of course, will alter the matter, and, like any other legatee, she will be entitled to have her legacy answered when the contingent assets fall into possession.(p)

If the husband has not disposed of the paraphernalia absolutely, as he may do, but merely given them in pledge, the widow, after the debts of the husband have been provided for, will be entitled to have them redeemed out of his remaining estate, in preference to his gifts by legacy.(q)

It follows, as a necessary consequence, from the inability of the husband to give away the paraphernalia by will, that a bequest by the husband to the wife, in terms including those things which constitute paraphernalia, will not be any bar to the widow claiming the paraphernalia, as such, in her [*216] own right.(r) But if the wife, by her settlement on marriage, *agree to take the provision given by it, in lieu of everything to which she will be entitled, except what the husband may give her by will, this will bar her right to paraphernalia, inclusive of things of that nature

(m) *Northey v. Northey*, ubi supra.

(n) *Tipping v. Tipping*, 1 P. Wms. 730; *Snelson v. Corbet*, 3 Atk. 369.

(o) *Ibid.*

(oo) *Burton v. Pierrepont*, 2 P. Wms. 79.

(q) *Graham v. Londonderry*, 3 Atk. 395.

(p) *Ibid.*

(r) *Marshall v. Blew*, 2 Atk. 217.

which may have been given to her by the husband after the date of the settlement.^(s)

The paraphernalia of the wife seem to be the only personal property, not expressly given to or settled upon her for her separate use, which she is capable of retaining and enjoying during the coverture.

With regard to the real property of the husband, the wife does not, by the marriage, acquire any right in it, to be enjoyed during the coverture, as might naturally be expected from the condition to which the coverture reduces her person in regard to the enjoyment of either real or personal property.

CHAPTER II.

RIGHTS ACQUIRED BY THE WIFE BY THE MARRIAGE IN THE PERSONAL PROPERTY OF THE HUSBAND—TO BE ENJOYED AFTER COVERTURE HAS TERMINATED.

§ 1.—*Rights of the Wife, after the Coverture has ended, in the Personal Property of the Husband.*

(a) *In case the Husband have made a Will.*

IN ancient periods of the law of England, according to several authors of learning and reputation, a married man's personal property was subject to a bipartite or tripartite *division, according as he had or had not children. If he had a wife only, she was entitled to one half of the pro- [217] perty, and the other half remained at his disposal by will or otherwise. If he left a child as well as a wife, then one-third went to the wife, another third to the child, and the remaining third was at his own disposal. Whether this was the law which prevailed over the kingdom generally, as it then did and still does in Scotland, or whether it was only operative in particular localities, by virtue of special customs, is a question more of speculation than of utility. If it was the general law, as seems more probable, it gradually ceased to be so, for, in later periods, according to the common law prevailing throughout the kingdom, with the exception of the City of London, the Province of York, and parts within the Principality of Wales, a man was entitled to the absolute disposal by will, of his whole personal property. And, by successive statutes,^(a) which describe the law existing in the localities which have been mentioned as a custom or usage, and put an end to it accordingly, the common law in this respect was assimilated

(s) *Cholmeley v. Cholmeley*, 2 Vern. 83.

(a) 4 & 5 Will. & Mary, c. 2, and 2 & 3 Anne, c. 5, as to the Province of York; 7 & 8 Will. & Mary, c. 38, for Wales; 2 Geo. 1, c. 18, as to London.

over the whole kingdom; and now, by general statute, (1 Vic. c. 26,) applicable to all wills made after 1st of January, 1838, every man is entitled to bequeath by will his whole personal property as freely as he formerly could have disposed of only a third part of it. So that the widow has not now, upon the death of her husband, any right in the personal property of her husband, which she can set up in opposition to his disposition of it by his will duly executed.

[*218] *§ 2.—*Rights of the Wife in the Personal Property of the Husband dying intestate.*

If the husband should die intestate, then the division of his personal property is regulated by the 22 & 23 Car. 2, c. 10, commonly known as the Statute of Distributions; and the division, so far as regards the widow and children, is pretty much the same as it was under the ancient common law already noticed. If there should not be any children of the marriage living at the husband's death, or any legal representative of children deceased, the wife, if not barred by settlement made before marriage, is entitled to an equal half of the husband's personal property which remains after payment of his debts, and the other half goes to her next of kin. If there should be children of the marriage, the widow is entitled only to one-third of the property; the other two-thirds go to the children.

Should the husband, by his will, give the wife a part of his personal property in satisfaction of all she could by law be entitled to out of his personal property, and dispose of the remainder to other objects of his bounty, if that disposition fail, the property covered by it will be considered in the same situation as if the husband, as to it, had died intestate; or, rather, perhaps, it will be held that the husband intended that the exclusion of his widow from the enjoyment of more than he had given her should operate only in favour of the other specific objects of his bounty; and that, that gift having failed, the subject of it should be divisible in the same manner as if there had not been any gift. In such a case, therefore, the widow will take not only what the will gives her, but her third or a half, as the case may be, of what was covered by the lapsed gift. (b)

[*219] *The case of a covenant or agreement by the husband, before marriage, to pay the wife or leave her a sum of money will be considered when we come to speak of the rights acquired by the married persons, by contract, in the property of each other. At present it may be observed, that such a covenant or agreement will bar the wife surviving from taking any further interest in the personal property of her husband who has died intestate.

§ 3.—*Wife's Right in Husband's Personal Property under Customs of London, &c.*

Such is the general law upon the subject of the wife's interest in the personal property of her husband after his death. But local custom is also a part of the law, and, where established, will modify the general law.^(v) Customs may exist in other places,^(w) but those best known, and which alone will be noticed here, are the customs of the City of London, the Province of York, and some parts of the Principality of Wales, which there is reason to think are remains of the old common law. The operation of these customs is especially saved by the 4th section of the Statute of Distributions, except in regard to the dead man's part, to be noticed presently, and that, by the 1 Jac. 2, c. 17, is made subject to the operation of the Statute of Distributions.

These customs, so far as regards the rights of the widow in the husband's property, are pretty nearly the same, with one exception, viz. that the custom of York, according to Roper,^(x) though upon what authority he does not say, requires that the husband should have had his fixed or general *residence within the province, at the period of his death; whereas [^{*220}] the custom of London follows the person, and operates although the freeman may never have had a domicile or resided within the city.^(y) If, therefore, the testator died within the province of York, but was a freeman of the City of London, the custom of the city will regulate the distribution of his estate.

According to these local customs, it was not in the power of the husband to regulate by will the disposition of his personal property, except as to that portion which was called the "dead man's part." In regard to all the rest, the custom fixed its appropriation, beyond the power of the husband to disturb it. But now, by several statutes,^(z) these customs are altered in this respect, that the husband may regulate the disposition by *will*; but so far as he does not do so, the custom continues in force.

Where, therefore, a husband dies *intestate*, his personal property being subject to the custom of one or other of the localities which have been mentioned, the property, after payment of debts and funeral expenses, and deduction of the widow's apparel, and the furniture of her bed chamber, in London called "the widow's chamber," or the sum of £50, where the value of the property exceeds £2000, will be divided in the following proportions:—If the husband leave children, the widow will be entitled to one-third, another third will go to the children, and the remaining third to the husband's administrator as dead's part. If he do not leave children, the widow will be entitled to one-half, and the other will, as before, go as dead's part. And as the dead's part is by the 8th section of 1 Jac. 2, c. 17, to be distributed under the Statute of Distributions, where the "administrator may

(v) Vide Co. Litt. 110, b; and 176, b, n. (5).

(w) Ibid.

(x) Vol. 2, p. 7.

(y) Webb v. Webb, 2 Vern. 110; Rutter v. Rutter, 1 Vern. 180.

(z) 4 & 5 Will. & Mary, c. 2; 2 & 3 Anne, c. 5; 7 & 8 Will. 3, c. 38; 11 Geo. 1 c. 17.

[*221] claim to have it," which must *mean where the husband has not disposed of it by will, as by the custom he might, the widow will be entitled to her share of the dead's part, where the husband dies intestate as to it.

The right of the widow to a distributive share of the husband's personal property, either under the customs of London or York, or under the Statute of Distributions, may be obviated in several ways.

The husband may purchase the right by settlement before marriage. By the custom of London, if the wife accept a settlement of part of her husband's property, though there should not be any mention of her right under the custom, she will be barred of her customary part, upon the principle that she has not trusted for her provision to the custom, which is liable to be affected by all the casualties of trade and other contingencies, but has preferred the fixed provision given her by the settlement. (a) This presumption will of course be rebutted by expressions in the settlement, shewing that it was not intended to bar the custom; (b) nor will the bar arise at all, where the provision made by the settlement is out of lands, for the custom regards only the personal property; (c) nor even where the settlement is not more than a covenant to invest money in the purchase of lands, for the money is then become a debt of the husband, and so out of the custom, (which only regards what is beyond the debts,) and has in equity become land, which also is out of the custom. (d)

A settlement in bar of dower, which affects lands only, will not operate as any bar to the widow's right to her customary part of the personal property. (e) But if the *terms of the settlement are broad enough to shew that it was purchased as a satisfaction of the wife's legal claims generally, the same principles which will be noticed afterwards, as being operative to make such a settlement a bar to the claim of dower, will be applicable to defeat the widow's claim, under the custom, to a share of the husband's personalty, or of the dead man's part under the Statute of Distributions. (f)

Where the provision by the husband for the wife has been by settlement made *after* marriage, the widow will be entitled to elect between it and her customary part and distributive share, according to the same rules which will afterwards be noticed in regard to her election between dower and benefits given to her by her husband.

Previous to the passing of the statutes, which gave husbands the power to distribute their property by will, and while, as yet, they had that power only in regard to the dead's part, or a third of their personalty, attempts were frequently made by husbands to defeat the widow's right, under the custom, by giving away their personal property among their children or other persons in their lifetime. Such gifts, when made *bonâ fide*, although etiam in articulo mortis, were sustained as good; (g) but were set aside, except as to the dead's part, where the circumstances shewed that no absolute gift had been made, but that a scheme had merely been devised for

(a) *Lewin v. Lewin*, 3 P. Wms. 16. Whether the custom of York is the same in this respect, I have not been able to discover.

(b) *Kirkman v. Kirkman*, 2 Bro. C. C. 95.

(c) *Stanton v. Platt*, 2 Vern. 753.

(d) *Babington v. Greenwood*, 1 P. Wms. 532.

(e) *Atkins v. Waterson*, 1 Eq. Ca. Abr. 159.

(f) *Benson v. Bellasis*, 1 Vern. 15.

(g) *Hall v. Hall*, 2 Vern. 277; *Tomkins v. Ladbroke*, 2 Ves. sen. 594.

defrauding the custom; as where the gift, though by irrevocable deed, was not to take effect until after the husband's death : (h) or where he retained a life interest; (i) or voluntarily confessed a judgment defeasanced for a payment to take effect after his death; (k) or where the deed of gift was retained by him in his own possession. (l) [*223]

But after the passing of the statutes which allowed all persons, whose estate was subject to the custom, to give, devise, will, and dispose of their personal estate as they should think fit, there ceased to be any motive for such contrivances to defeat the custom, as this could thenceforth be openly, directly, and at the same time legally accomplished by last will. But by the 11 Geo. 1, c. 18, which gave freemen of London power to make a will, there is a special saving of agreements in writing, made upon or in consideration of marriage or otherwise, that the personal estate should be distributed according to the custom. Where, therefore, an agreement of this kind has been made, there may be a temptation to evade the effect of it, in the same way that attempts were made previous to the statute to defeat the custom itself. By the custom it was only over such part of the personal property of the husband, as, after the exercise of an absolute right of administration, continued his, that the custom had effect. An agreement, therefore, that his property should go according to the custom, as it would not interfere with this right of administration, would only apply to such property as should remain after the exercise of it, in the same way as where there was no such agreement: but there would exist the same temptation to evade the agreement; and, under the colour of this right of administration, to make a gift, while at the same time the donor retained his control over it. Should such cases arise, probably the same principles will be resorted to in order to test the good faith of what has been done, and the same relief be given where a fraud upon the agreement appears to have been the object in view. Although several cases are referred to, both by Roper and *by [*224] Williams, as being of this nature, none of them in fact are so. They are one and all cases in which the party attempted not to defeat an agreement of the kind adverted to, but to defeat the custom by acts of a testamentary nature, at a time when the power to do so by will had not as yet been given.

*BOOK VI.

[*225]

RIGHTS OF WIFE IN REAL PROPERTY OF HUSBAND—AFTER COVERTURE HAS TERMINATED.

AFTER the coverture has terminated by the death of the husband, leaving

(h) *Tomkins v. Ladbroke*, ubi supra.

(i) *Turner v. Jennings*, 2 Vern. 612; *Smith v. Fellowes*, 2 Atk. 62.

(k) *Fairbeard v. Powers*, 2 Vern. 202.

(l) *Edmundson v. Cox*, 7 Vin. Abr. 202, pl. 11.

the wife surviving, she is entitled, not only to the enjoyment of her own real property, but to interests in that of her husband, which are known as her "Quarantine" and "Dower."

QUARANTINE.

The widow's "quarantine" will not require any very lengthened notice. It may be described as that right which the law, in provident care of the destitute situation into which a woman may be cast by the death of her husband, has given widows in the property of their husbands, until the time at which their dower should be assigned.

As dower is not assignable *immediately* upon the husband's death, the law gives the widow a right to remain in the house of the husband for the space of forty days after that event, and to have while there reasonable estovers of the common; (a) and Jenkins (b) says, that, whilst so remaining, she is also to be sustained by the husband's victuals; which is confirmed by a query in Fitzherbert. (c)

This right of the widow is called the "widow's quarantine," and is given only while she continues such. It ceases, therefore, should the widow marry [*226] again during the forty *days. (d) If the heir or other tenant of the land put her out before second marriage or expiration of the forty days, her remedy is by writ of Quarantina Habenda. (e)

DOWER.

Such being the nature of the temporary interest which a widow takes in the property of her husband upon his death, we shall now consider her estate of "dower" in her husband's property, a subject which will require a much more lengthened investigation: for, although it be true that the statute of the 3 & 4 Will. 4, c. 105, has introduced several important alterations upon this branch of the law, it would be altogether a mistake to suppose that that statute has superseded the old law and made a knowledge of it superfluous. In the first place, the operation of the statute is confined to the dower of widows, who shall have been married after the 1st of January, 1834; and it must be some time yet before it can be said that questions will not arise in regard to the rights of widows married before that date; and even as to these, its provisions, in regard to dower attaching upon lands descended upon the husband or acquired by him during the coverture, do not do more than put in the power of the husband to defeat the right by declaring that it shall not have effect. If the husband should not exercise this power, then the widow's right of dower attaches, although she may have been married subsequently to the 1st of January, 1834. But what is more important still, and obvious upon the most cursory perusal of the statute, is, that there are many parts of the law of dower which are left altogether untouched by it. In every view, therefore, the study of the law of dower, as it existed prior to that act, has in no degree lost its importance; but, in order that

(a) Co. Litt. 34, b.

(c) Nat. Brev. 162 A.

(e) Ibid.

(b) Rer. Jud., p. 284, case 16.

(d) Co. Litt. 34, b.

the attention of the reader may not be distracted *between what the law is in regard to the two classes of rights, those arising from [*227] marriages celebrated prior to or on the 1st of January, 1834, and those arising from marriages celebrated subsequent to that date, the alterations introduced by the statute will, in the following pages, be engrafted upon the history of the old law.

CHAPTER I.

NATURE OF THE ESTATE OF DOWER, AND THE DIFFERENT KINDS OF IT.

DOWER is that estate which, upon the death of the husband, the law gives to the wife surviving in all estates of inheritance, of which the husband was solely seised during the coverture, and to which any issue she might have had might by any possibility have been heir. The object of the estate so given is the support of the widow, and the nurture and education of the husband's younger children.(a)

By the common law dower extends to one-third of the husband's real property, but custom may alter this. Thus, it is a peculiarity in the tenure of gavelkind that the dower of the widow is *a half* instead of *a third*; but the enjoyment of it is limited to her continuing chaste and unmarried. She forfeits her dower in gavelkind land, therefore, by a second marriage.(b) In the cases cited it was decided that the widow, having married again, could not waive the custom and claim a third, according to the common law; for the custom was the law of the place, and it was for the benefit of the heir that she should take according to the custom, as she could enjoy only while remaining sole.

*Another exception to the rule, that the widow is entitled to one-third, exists in lands held by the tenure of borough-English, [*228] where there is a custom that the widow shall have the whole instead of a third(c)—a custom which seems to have arisen out of this, that, as the eldest son was introduced to the trade of his father, and the land by inheritance, according to the custom, went entirely to the younger son, the widow should have the rent of the whole for maintenance of the other children.(d) Coke says, that this custom doubtless may exist in a county, city, or ancient burgh; and, according to Littleton, it extends to upland towns, neither counties, cities, nor burghs.(e) In copyholds, as they are not estates of inheritance, but held at the will of the lord, there is no dower of them, unless authorised by the custom; and, as the custom varies in different manors, so must the dower, or rather *free bench*, as in this case the estate of the widow is called; it may, therefore, be either of the whole or only a

(a) Co. Litt. 30, b.; Gilb. Dower, 363.

(b) Hunt v. Gilburn, Cro. Eliz. 121; Davis v. Selby, Id. 825.

(c) Litt. s. 37.

(d) Bac. Abr. "Dower," O. 1.

(e) Co. Litt. 33, b.

part of the lands, according to the custom, *(f)* or for the widow's life, or only during her widowhood. *(g)* As custom may enlarge, so, also, may it abridge the dower and restrain it to a fourth or other smaller proportion. *(h)*

If dower were assigned by the husband *ad ostium ecclesiæ*, or *ex assensu patris*, it might have been of more or less than a third, in the option of the parties. *(i)* These two species of dower, however, are now mere matter of history. By the 4 & 5 Will. 4, c. 105, s. 13, they are both abolished. There was likewise another species of dower, viz. *de la plus belle*, *(k)* now so completely a matter of history as not even to be noticed by the 3 & 4 Will. 4.

[*229]

*CHAPTER II.

WHAT KINDS OF PROPERTY OF THE HUSBAND THE ESTATE OF DOWER ATTACHES UPON.

THE right of dower attaches upon all lands or tenements. The latter of these words, as explained in Co. Litt., *(a)* includes all corporate inheritances which may be holden, and all inheritances issuing out of any of those inheritances, or concerning or annexed to the same, though they lie not in tenure. Thus, the widow is entitled to dower out of the profits of stallage, mills, fairs, courts, fines, and heriots, and public offices, as the Marshalsea; of a park, a dovehouse, a piscary, presentation to an advowson *(b)* in gross or appendant, *(c)* common certain, a rent-service, rent-charge, or rent-seck, *(d)* franchises appendant to an honour, *(e)* tithes, *(ff)* and generally any profits and liberties of which the husband had an estate of inheritance. *(gg)* In *Buckeridge v. Ingram* *(hh)* it was held, that shares in a public company, constituted for the purpose of improving the navigation of a river, with a power to levy tolls on ships using the navigation, but which had no right in the soil of the river, were real estate, as hereditaments arising out of or affecting land, or exercisable within it, upon which dower would therefore attach. In *Drybutter v. Bartholomew*, *(ii)* shares in the New River Company were regarded as real estate; the Master of the Rolls observing, that a fine was usually levied of them, "by the description of so much land *aqua co-operta*." But the *widow has not any [*230] dower of a common *without stint*; for the interests of two persons in such a right are necessarily incapable of measurement, and, if she and the heir were both to enjoy it, the common would be overstocked. *(kk)*

(f) *Borastown v. Hay*, Cro. Eliz. 415.

(h) Co. Litt. 33, b.

(k) Litt. s. 48.

(a) Co. Litt. 32, a.

(c) *Howard v. Cavendish*, Cro. Jac. 621.

(e) *Howard v. Cavendish*, ubi supra; Co. Litt. 30, b.

(ff) 32 Hen. 8, c. 7, s. 6.

(hh) 2 Ves. jun. 651.

(kk) Co. Litt. 30, b., and 30, a.; Perk. sect. 341.

(g) *Lindsay v. Dixon*, Dyer, 192, a.

(i) Litt. ss. 39, 40.

(b) Ibid.

(d) Co. Litt. 32, a.; Perk. s. 347.

(gg) *Fitzher. Nat. Brev.* 347.

(ii) 2 P. Wms. 127.

It is generally to be observed, that it is no objection to a claim of dower that the hereditament out of which it is claimed is in its nature indivisible; for, though it be so, the widow will be endowed in a special manner, so that she may have the value, or an equivalent.^(l) Upon the authority of *Co. Litt.* 31, b., a question was raised in *Gerard v. Gerard*,^(m) as to whether dower attached on the principal mansion of the husband, who had been created a baron by patent; but the Court decided, that the exception mentioned in *Coke* referred only to feudal castles, given at the creation of the barony, to be held for the defence of the kingdom: dower, therefore, is claimable out of a mansion, as of other hereditaments.

It will be observed of the hereditaments, which have been mentioned as instances of the kind of property falling under the right to dower, that dower gives the enjoyment only of profits that have a periodical renewal, without actual consumption of the hereditament itself. In this respect, mines are an exception. As they are not capable of any enjoyment which does not necessarily produce consumption of the hereditament itself, it was supposed that dower would not attach upon them; but, in *Stoughton v. Leigh*,⁽ⁿ⁾ the question was fully considered upon a case sent out of Chancery; and the judgment of the Court was, that the widow was dowable as well of mines under the land of third parties, but purchased from them by the husband, as of mines under his own lands, where they had been opened and wrought before the death of the husband, without *regard to [*231] whether he had continued or discontinued the working; but that she was not dowable of mines in either situation which had never been opened at all before the death of the husband. This case is valuable, as will be afterwards seen, as shewing how dower is to be assigned, where it is impossible or inconvenient to give possession of an actual third.

Questions have arisen in regard to real property belonging to a partnership, whether it should be considered real or personal estate in the succession of the partners. These questions are interesting here; because, upon their determination one way or the other will depend the right of the widows of the individual partners to dower out of the property in question. The decisions upon this subject, though perhaps not entirely reconcilable with each other, do not occasion any great conflict, and will probably be found to establish the following propositions:—

First. If the property belong to one of several partners, and be given by him in trust for the partnership purposes, and upon the death of a partner, or the dissolution of the partnership by any partner retiring, then upon trust to sell the property, and out of the proceeds to pay the partnership debts, and divide the remainder among the partners, according to their respective interests in the partnership:—this latter trust will amount to an order for conversion into personal estate, and, as such, the interest of the partners in the estate will go to their executors.^(o)

Second. If freehold property be purchased with partnership money, under an agreement in the articles of partnership, that, upon the dissolution

(l) *Co. Litt.* 32, a.; *Stoughton v. Lee*, 1 Taunt. 402.

(m) See *Ld. Raym.* 72; 5 Mod. 64; and the other contemporaneous Reports.

(n) 1 Taunt. 402.

(o) *Ripley v. Waterworth*, 7 Ves. 425.

of the partnership, the estate should be sold and divided, the share of a partner dying will go to his executors as personal estate. This seems to be the effect of *Townshend v. Devaynes*, when the report of *that case [*232] by Montague, in the Notes to his book on Partnership, is completed by the additional information from the Registrar's book, given by Mr. Jacob in his argument in *Houghton v. Houghton*.(p)

Third. If freehold property be purchased with partnership money, and be treated and dealt with by the partners as partnership property, it will be considered as such, and descend as personalty to the executors of the deceased partners.(q)

Fourth. On the other hand, if freehold property, belonging to one of the partners in a company, be in part given by him to his co-partners as real property, to be enjoyed as such, it will be so treated, and will so descend to their respective heirs, even although the articles of partnership may have declared that the property shall be treated as partnership property, unless the necessities of the partnership may have required that it should be sold for payment of the partnership debts; for this declaration was regarded merely as devoting the property to the liabilities of the partnership, and not as doing away the other unequivocal indications of an intention not to convert into personalty that which in its own nature was realty.(r)

Fifth. If real property be bought with partnership money, to be held in trust for the partners, in the proportions in which they are respectively interested in the partnership, without any agreement as to its valuation or sale, the property will go, upon a dissolution of the partnership, to each partner in its original character of realty.(s)

Sixth. If persons, already possessed of land in undivided moieties, enter into partnership as farmers of the land, and subsequently enter into partnership in trade, and, out of *the general profits of the partnership, [*233] purchase other land, which is used by them for agricultural purposes, the nature of the land which the partners originally held, and which they purchased for application to the same purpose, viz. agriculture, will not be changed by the circumstance that the partners in agriculture happened collaterally to be engaged as partners in trade, but will continue real estate, and descend to their heirs as such.(t)

The general principles, deducible from the propositions which the cases establish, seem to be, that the nature of the succession to real property, held by a partnership, as between the heirs and executors of the partners, where it has not been necessary to sell the property for partnership purposes, will depend upon the indication of intention shewn by the articles of partnership. If the articles shew an intention to convert the property into personalty, it will have that character given to it, in the succession of the individual partners;(u) on the other hand, if the articles discover an intention that real property, though to be liable for partnership debts, should retain

(p) 11 Sim. 497.

(q) *Houghton v. Houghton*, 41 Sim. 497.

(r) *Cookson v. Cookson*, 8 Sim. 529.

(s) *Thornton v. Dixon*, 3 Bro. C. C. 198; *Phyn v. Bell*, 7 Ves. 452; *Balmain v. Shore*, 9 Ves. 500.

(t) *Randall v. Randall*, 7 Sim. 271.

(u) *Ripley v. Waterworth*, 7 Ves. 425; *Townshend v. Devaynes*, Mont. on Part., Notes, p. 97.

its character, it will be so treated in the succession of the partners.^(v) And, if the articles be silent either way, the mere circumstance of the property being devoted to partnership purposes will not alter its nature in the succession of the partners, but that which was real in its nature will continue such in the succession.^(w) It is difficult, however, to reconcile the decision in *Houghton v. Houghton*(^x) with this latter principle, to which, and to the cases upon which I have rested it, it seems to be directly opposed; and it does not stand alone in this respect, for it is supported by a decision of Sir J. Leach, M. R., *in *Phillips v. Phillips*, where his Honor stated as a general proposition, that "all property, whatever might be its [^{*234}] nature, purchased with partnership capital for the purposes of the partnership trade, continued to be partnership capital, and to have to every intent the quality of personal estate;" this, his Honor said, he confessed he had for some years, notwithstanding older authorities, considered to be settled. In that, however, his Honor seems to have been under misapprehension; for, unless the cases have been misstated, they not only do not establish the general proposition he lays down, but, on the contrary, directly negative it; and the proposition is equally opposed by the dictum of Lord Eldon in *Stuart v. Marquis of Bute*,(^y) that "in cases where persons engaged in partnership have bought freehold houses, the difficulty of distinguishing and arranging property of different natures, partly personal, partly real, has never, except by the effect of the contract or the will, been held sufficient against the heir."

Having thus stated what the cases seem to establish upon ascertained facts, and suggested the general principles apparently deducible from them, the reader is left to give such weight to the cases of *Houghton v. Houghton*, and *Phillips v. Phillips*, as in his opinion he may think they deserve; but it may be added, that, in *Broom v. Broom*,(^z) Sir C. Pepys, M. R., on the authority of *Phillips v. Phillips*, and in the absence of any indication by the partners, either in articles of partnership or otherwise, as to the nature which the estate was thenceforth to bear, treated real estate, purchased with partnership assets, as personal estate; but that case does not appear from the report to have met with much discussion.

It is to be inferred, however, from all the cases, that real estate purchased with partnership funds, and applied *to partnership purposes, where it continues joint property, will be liable for payment of the [^{*235}] partnership debts; and that, if the heir be entitled to the land, or the widow to dower out of it, the right will attach only upon the surplus, after payment of the debts. But where real property was purchased with partnership funds, under an agreement between the partners that it should belong to one of them alone, it was held, as against the creditors of the firm, that the widow of this partner was entitled to dower out of the land.^(a)

If one estate of the husband have merged in another, the widow will not be entitled to dower of both. Thus, if the husband have a seignory in land and the tenancy fall to him by escheat, the widow will not be entitled to

(v) *Cookson v. Cookson*, 8 Ves. 529.

(w) *Thornton v. Dickson*, 3 Bro. C. C. 198; *Phyn v. Bell*, 7 Ves. 452; *Bailmain v. Shore*, 9 Ves. 500; *Randall v. Randall*, 7 Sim. 271.

(x) 11 Sim. 491.

(z) 3 My. & K. 443.

(y) 11 Ves. 665.

(a) *Smith v. Smith*, 5 Ves. 188.

dower both of the seignory and the tenancy. The seignory being at an end, she has dower of the tenancy only; but, if possession be taken from her by a title older than her husband's to the tenancy, the seignory revives, either partially or entirely, according to the extent to which she may be disposed; and she has dower accordingly.(b) If, however, the husband, having the seignory, purchase likewise the tenancy, the widow may elect to be endowed of the seignory or of the tenancy, at her pleasure.(c)

Where the property liable to dower has been improved after the date of the marriage, at which time the wife's title to dower became inchoate, the answer to the question, whether, in the assignment of dower, the widow is to have the benefit of these improvements, was one of some importance under the old law, but probably will now seldom arise; for the 3 & 4 Will. 4, c. 105, enacts, as already mentioned, that no woman shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband *in his lifetime, or by his will; and land is construed in [*236] the statute to include every property out of which dower is claimable; so that, if the husband desire to do so, he has it in his power to prevent dower of improvements. It will be necessary, however, to consider the law upon the subject, lest cases should arise in which the husband may not have availed himself of the power given him by the statute to shut out any question of this kind, and in which the husband may not have had power to do so, by reason of the marriage having taken place before the 1st of January, 1834.

The law upon the subject rested, until a recent case, upon ancient authority, which was consistent neither with principle nor even with itself in some respects. It was said, that, if the husband were seised of land and enfeofed another of it, should the feoffee have improved the land in the life of the husband, the widow would have dower according to the value as in the husband's time;(d) and, in Co Litt.,(e) it is said in a note, upon the authority of Hale's MS., that the reason for this was, because the heir of the husband was not bound to warrant, except according to the value as it was at the time of the feoffment; and, therefore, if the widow were to recover more against the feoffee than he could recover from the heir, this would be against reason. It might have been expected therefore, that, if the feoffee had deteriorated the value of the land by his own act, in the life of the husband, the widow should have had remedy against him for the difference; but, upon the same authority,(f) it is said, that, if the feoffee take down buildings upon the land, the widow had dower according to the value *at the husband's death*, and has not any remedy for the taking away of the buildings; and the reason is added, for the wife *hath not right to have dower *before* [*237] *the death of the husband*. Then, as regards the heir, in Co. Litt.(g) it is said, that, if the heir improved the land *by culture*, the widow should have her dower according to the improved value, and not as it was in her husband's time, for her title was to the quantity of the land; and to the same effect is the outset of Plowden's forty-sixth query. Coke says, the law is the same if the heir improve the value *by building*; but Plowden, in the same query, says, it shall be otherwise if the heir improve the land

(b) Perk. sect. 321.
(c) 32, a.

(c) Perk. sect. 320.
(f) Perk. sect. 329, ed. 1621.

(d) Perk. sect. 328.
(g) 32, a.

by building or "the like collateral improvement." Plowden's query, then, is, if the heir suffer the houses to decay, shall the widow be endowed of the land according to its value when in the possession of the husband, or have its value in the hands of the heir, and be allowed in damages for the impairing? And he answers this by saying, "It seems that damages shall not be recouped in assize for the improvement." Coke, in the passage which has been referred to, says, "The widow, in such case, shall be endowed according to the value at the time of the assignment, and not according to the value in the time of the husband;" but he makes no observation as to damages for the impairing.

According to these authorities, in a question between the widow and a purchaser from the husband, the widow could not have had any benefit from improvements by the purchaser by culture or building, though she was open to suffer by dilapidations by the purchaser; and, in a question between the widow and the heir, the widow was entitled to the benefit of agricultural improvements by the heir, but not to improvements by building, as, in the language of Plowden, being collateral; while, on the other hand, she had no remedy for dilapidations by the heir.

Since the title of the widow must be as well known to the purchaser as to the heir, it is difficult to see why there should be any distinction in the two cases, or why an improvement by building should be [*238] more collateral than an agricultural improvement; or why, if the widow is not to have the benefit of improvements by building, either against the purchaser or the heir, she should not have a claim for damage by reason of dilapidations against both of them; or why the period of the husband's possession should be taken for fixing the value, where the purchaser has made improvements, and the period of the husband's death, where the purchaser has made dilapidations.

Such, however, was the state of the law upon this subject when the case of *Riddle v. Gwinnell*(h) occurred. In this case the land had been aliened by the husband to a purchaser, who again had aliened part of the land to purchasers from him, and by these persons two-thirds of the land had been covered with houses, the other third remaining unbuilt upon. Upon the authority of a case in *Fitzherb. Gr. Abr. "Dower,"* p. 192, in which it is said that W. pleaded to a writ of dower "quod emit terram illam de viro suo nudam et inædificatam, et super ædificavit, et libenter concedit ei tertiam partem suam salvis ei ædificiis. Et ideo ipso habebat seisinam suam salvis eidem W. domibus suis ædificatis ac quod habet alibi extra ædificia ubi habere poterit terram suam," &c.—a question was raised, whether the dower would not be satisfied by an assignment of that third of the land which was unbuilt upon? and another, whether the endowment was to be according to the value of the land at the time of the husband's alienation, at the time of his death, or at the time of assignment? The Court was of opinion, upon the first question, that the passage in *Fitzherbert* did not import a judicial finding of the right of the widow, but only a statement of an amicable arrangement; and that dower was to be assigned, not of one-third of the whole land, but of one-third of the land in each person's pos- [*239] session; and, upon the second question, after a review of the authorities

(h) 1 Ad. & E., N. S., 682.

which have been noticed, the Court found that dower attached at the period of the husband's death, according to its then actual value, without regard to the hands which brought it into the condition in which it was found, the law apparently presuming that it would continue substantially the same up to the assignment. In the case under consideration the fact was, that the value at the time of the death and the assignment were identical. This judgment was delivered by Lord Denman, who said he had the authority of Sir E. Sugden for saying, he had always considered the rule to be what the judgment lays down.

According to the law as now ascertained, therefore, the widow is entitled to be endowed as of the value at the date of her husband's death, having in her assignment the benefit of any improvements, whether made by the husband or by his alienee, and whether agricultural in their nature or otherwise; suffering the disadvantage, on the other hand, of any dilapidations, whether made by the husband or by his alienee; and she can neither be benefited by any improvements nor prejudiced by any dilapidations made by the heir of the husband after the husband's death, and before the date of the assignment of dower. Such, at least, is the law which will regulate cases that may arise with widows who were married prior to the 1st of January, 1834, and likewise with widows who may have been married subsequent to that date, where their husbands shall not have exercised the power to regulate this matter, which the act, 3 & 4 Will. 4, has given to husbands, by putting dower entirely within their own control.

[*240]

*CHAPTER III.

OF THE TITLE TO DOWER.

SUCH being the nature of the estate of dower and the kinds of property upon which it attaches, the matter which falls next to be considered are those things the existence of which is necessary in order to give the widow a title to the estate.

§ 1.—*Inheritable issue necessary to support Title to Dower.*

It is not necessary, in order to entitle a widow to dower, as is the case in regard to the husband's title to curtesy, that there should actually have been issue by her of the husband through whom she claims.^(a) It is sufficient that there might by possibility have been issue; but with this condition, that the issue must be such as might by possibility inherit the lands out of which the dower is claimed, and of such an estate as the husband had, and as heir to him.

It is to be inferred, from the very statement that there must be inherita-

(a) Litt. sect. 53.

ble issue in order to give a title to dower, that the woman claiming it must have been actually married to the man out of whose lands she claims it, and that by ceremony duly performed. (b) To consider the law of marriage, and to shew the distinction between marriages lawful and marriages void ab initio, and those only voidable, is foreign to this treatise. It will be assumed, therefore, that the reader has made himself acquainted with *these [*241] distinctions from the books which treat upon the law of marriage. If the marriage were a nullity from the beginning, the connexion between the man and woman will not give a title to dower: but it is otherwise if the marriage be only *voidable*, and was not voided in the lifetime of the husband; (c) for marriage voidable is nevertheless a marriage until it is voided, (d) which no marriage can be after the death of the husband.

Formerly, there was one exception to the rule, that marriage gives a title to dower where the other circumstances necessary to give that title concur, and that was in the case of aliens. The policy of the law is, that no alien shall hold lands within the kingdom; and this was extended to embrace the case of widows, who, if aliens, could not hold the third of their husband's lands by right of dower, (e) not even although they should have been made denizens, for that has no retrospective effect. (f) If, however, the marriage had been celebrated by special license of the Crown, the widow, though an alien, was entitled to her dower. (g) So, also, the widow was dowable, if she had been naturalised by act of Parliament; for naturalisation has relation back to cure all defects ab initio, unless the act contain a provision to the contrary. But now, with more liberal policy, the Legislature, by the 7 & 8 Vict. c. 66, has, in favour of women neither naturalised nor married by royal license, created an exception from the restriction imposed upon aliens as to their enjoyment of lands, by declaring, in its 16th section, that "any woman, married or who shall be married to a natural-born subject or person naturalised, shall be deemed and taken to be herself naturalised, and have all the rights and privileges of a natural-born subject."

*It will be observed, that this provision has a retrospective effect, [*242] to embrace not only women who should be married after the passing of the act, but women who had actually been already married at that time. The fact, therefore, of a widow being herself an alien by birth will no longer form an objection to her title to dower, provided her husband was either a natural-born subject or a foreigner who had been duly naturalised.

Although the law has required the possibility of inheritable issue of her husband, as a condition precedent to the wife's enjoyment of the estate of dower out of his land, it is not thence to be inferred that a woman will not be entitled to dower, because she was in an advanced period of life at the time of the marriage. The law certainly has fixed nine years of age as the time *before* which a female is presumed not to be capable of bearing children, but it has not fixed any period *after* which the same presumption will take effect. So far, therefore, as appears, a widow will be entitled to dower notwithstanding that, at the time of

(b) Moore, 226.

(c) Co. Litt. 33, a.

(e) Co. Litt. 31, b.

(g) 8 Hen. 5, not printed, but referred to in a note to Co. Litt. 31, b.

(d) Bury's case, 5 Co. 99.

(f) Menvil's case, 13 Co. Rep. 23.

her marriage, she may have been far advanced in life; for, as women in ancient times had children after the age of one hundred, the law cannot judge that to be impossible which by nature has been possible.^(h)

[*243] § 2.—*Of the Seisin in the Husband necessary to give a Title to Dower.*

Whether dower will attach upon equitable property, is a question which shall be considered presently; but, in so far as it attaches upon legal property, another circumstance must, until the passing of a late act of Parliament, have concurred with marriage in order to give a title to dower, and that was a seisin in the husband. The Dower Act,⁽ⁱ⁾ to which attention has already been drawn,^(k) has made a very important alteration upon the subject of seisin, so far as regards widows who were married subsequent to the 1st of January, 1834; for it enacts, by its 3rd section, that, when a husband shall have been entitled to a right of entry or action in any land, and his widow would have been entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the land, although her husband should not have recovered possession thereof, provided the dower be sued for or obtained within the period during which such right of entry or action might be enforced. This is, in other words, saying that the widow shall have right to dower, provided the dower be sued for within twenty years from the time at which the right to make an entry or bring an action to recover possession of the lands shall first have accrued; for, by 3 & 4 Will. 4, c. 27, twenty years is the limitation within which an entry may be made, or an action for recovery of lands be brought. As to dower, therefore, claimed by widows married subsequent to the 1st of January, 1834, it will not, in order to support the claim in those cases where, [*244] by the former law, seisin by the husband was *required, be necessary that there should be such a seisin; a right of entry will be sufficient.

With regard, however, to widows who were married prior to or on the 1st of January, 1834, the law upon the subject of the seisin in the husband, necessary to give a title to dower, continues as it was previous to the passing of this statute of Will. 4. It will be necessary, therefore, to consider the law in this respect.

As already observed, the old law required, in order to give a widow a title to dower, that her husband should have been seised of the lands out of which it was claimed.

In order to give a title to *curtesy*, it is necessary, as has been said,^(l) that the wife, or the husband in her right, should have had, not only a seisin *in law*, but a seisin *in fact*, during the coverture, in the property out of which *curtesy* is claimed; but, with regard to *dower*, a seisin *in law* alone, was prior to the Dower Act, sufficient to give a title to it; and the reason for the difference is, that it lies in the power of the husband at any

(h) Co. Litt. 40, a; 1 Roll. Abr. 675, pl. 10.

(i) 3 & 4 Will. 4, c. 105.

(j) Ante, p. 152.

(k) Ante, p. 226.

time to bring the seisin in law of his wife's property to an actual seisin, while this does not lie within the power of the wife in regard to the husband's property.(m) If, therefore, lands descended upon the husband, his widow was entitled to dower out of them, although the husband might have died before entry,(n) and although the husband might have been disseised, if the disseisin occurred during the coverture; for the seisin in law of the husband was but the continuance of his ancestor's seisin; and a seisin for any point of time would have supported a title to dower, with the exception to be afterwards noticed.(o) The seisin, therefore, for the period between the ancestor's death and the disseisin was necessarily sufficient for this purpose.(p) If, however, the *seisin, which was cast upon the husband [245] by descent, had been taken out of him by abatement or otherwise before the coverture, and he was unable to obtain an entry during the coverture, the widow was not dowable, for there was no period during the coverture at which the husband was seised.(q)

A mere right of entry in the husband, not exercised during his lifetime, would not have supported a title to dower, although it will now do so under the statute as has been seen; for such right per se does not give the husband any estate in the land. Thus, if the husband had been a party to an exchange of lands with another, and had died before entering upon the lands received by him, the widow could not have had dower out of these lands, for the husband was never seised of them,(r) since, in exchanges, the party has no freehold either in deed or in law until he executes the change by entry.(s) According to Perkins, in the passage which has been referred to in the note, the widow would not have been dowable either of the land taken or the land given by her husband in exchange; but, inasmuch as the widow would have had her election between the two, if the exchange had been executed,(t) there seems no reason why she should not have had dower out of the land given by her husband in exchange, in the case supposed; for, in this case, as in the other, the other party to the exchange would have had his relief by re-entry, for eviction, to the lands which he had given in exchange. If, however, the exchange had been made by lease and release under the Statute of Uses,(u) the result would have been different; the widow in that case would have been dowable, for the statute transfers the seisin and possession to the use, so that actual entry would not have been necessary in order *to give the husband a seisin. So, if the husband had before marriage, aliened the land upon a condition for re-entry, [246] and the condition had been broken during the coverture, but the husband had died before re-entry, his widow would not have been dowable, because his seisin would not have been revested at any time during the coverture.(v) Or, if the husband had been a disseisee, and had died before entry upon his disseisor, his widow would not have been dowable.(w)

(m) Co. Litt. 31, a.

(n) Litt. sects. 448. 681.

(o) Post, p. 249.

(p) 1 Bro. Abr. Dower, p. 255, pl. 75; Perk. sect. 371.

(q) Perk. sect. 367.

(r) Perk. sect. 369.

(s) Co. Litt. 50, b.

(t) Perk. sect. 319; Co. Litt. 31, b.

(u) 32 Hen. 8, c. 10.

(v) Fitzwilliam's case, 6 Co. Rep. 34; Perk. sect. 368.

(w) Perk. sect. 366.

Neither would a bare right of action have given a title to dower; so that, if the husband had had judgment to recover land, but had died before entry or execution sued, his widow would not have had dower of the land;(x) or, if the husband had been a disseisee, whose right, by the death of the disseisor, after five years' possession, had been reduced to a right of action, his widow would not have been dowable. In neither of these cases was the seisin of the husband revested during the coverture.

Neither would a mere right to seisin upon an uncompleted title have given a right to dower. Thus, if the husband had acquired lands by bargain and sale, but had died before inrolment of the indenture, his widow would not have been dowable; for, although by the 27 Hen. 8, c. 10, the seisin and possession would be transferred to the husband upon the execution of the indenture, this effect, by the 27 Hen. 8, c. 16, is postponed until inrolment of the indenture, and as that was not made in the husband's lifetime, he, in this way, never had a seisin in the lands.(y) As the statute allows six months for the inrolment to be made, and the effect of its being made within that time is that the seisin has relation back ab initio to the date of the bargain and sale, Roper(z) considers, that, if the death of [247] *the husband had taken place within the six months, and the inrolment had also been made within that period, the widow would have been entitled to dower, because, by the relation of the inrolment to the date of the bargain and sale, the husband would have been seised prior to his death; but the authorities to which that author refers do not altogether support his position. In Dymmock's case,(a) which is opposed to Roper's reasoning, the bargain and sale was dated the 13th of July, and the inrolment was made upon the 30th of October following, and therefore was within, and not after the expiration of, the six months, as he supposed; yet the opinion of the Court was, that the widow was not dowable, although the land was in the husband from the date of the bargain and sale, so as to make the heir in ward, which was the question for decision; and in Touchstone(b) it is said, that "if A. bargain and sell lands to B., and die before inrolment, and then the deed is inrolled, the wife of B. shall not have dower;" for which reference is made to two cases in James the First's time, which have not been traced. No mention is made here, certainly, of the six months, one way or other; but Gilbert, C. B.(c) says, that "if the bargainee die before inrolment, his wife shall not be endowed;" and he gives the reason for this in a way which shews that omission of mention of the six months is immaterial: "For the right of dower is, according to the rule of common law, consummate by the death of the husband, and, at the death, the bargain and sale had no effect to vest the lands in him; and, though the freehold, after inrolment, has a retrospect to the date of the deed, yet there cannot thereby arise to the wife a new title of dower, contrary to the rule of the common law, without an express provision by the statute." On the [248] other hand, Gilbert likewise says elsewhere:(d) "If the estate shall be *said to pass as to strangers ab initio (by relation) for their dis-

(x) Perk. sects. 370, 375.

(z) Vol. 1, p. 386.

(a) Ubi supra.

(c) Uses and Trusts, 96.

(y) Dymmock's case, Ow. 153.

(b) Shep. Touch. 226.

(d) Ibid. p. 292.

advantage, it shall pass for their advantage; and, therefore, if a bargain and sale be made to a man, and he die, and then the deed is inrolled, it seems his wife ought to be endowed." And Saunders(e) says, that "if the bargainee die before inrolment, his widow shall be endowed if the deed be afterwards inrolled;" and, for authority, he makes reference to Frevil's case, referred to by counsel in *Flower v. Baldwin*(f) in these terms: "So, if a bargainee hath a wife, and dies, and afterwards the deed is enrolled, the wife shall have dower, as it was resolved for the wife of Baron Frevil." Saunders likewise makes reference to a dictum of the Court in *Parker v. Bleeke*;(g) but that dictum is foreign to the subject, as it applies to the wife of the bargainor, not of the bargainee; unless, indeed, it be necessary that the widow of the one or the other should be endowed, which by no means follows. The dictum is, that the case for decision was "like the case where one bargains and sells by indenture, and takes wife and dies, and afterwards the deed is inrolled within six months, the feme shall not have dower;" an observation which, it must be remarked, applies to the widow of the bargainor, not of the bargainee.

Having thus given the authorities, the reader is left to form his own opinion, whether, according to the old law, if a deed of bargain and sale had been enrolled after the death of the bargainee, but within the six months, his widow would have been entitled to dower. It would seem, however, that if the bargainor had died leaving a widow whom he had married after the bargain and sale, she would not have been entitled to dower if the deed had been inrolled within the six months; for, although, no doubt, her husband died seised, yet, as the inrolment, when it takes place, draws back to the date of the deed, so as to vest the seisin and possession *in the bargainee as at that time, the necessary effect is to divest the [*249] seisin that was in the bargainor during the coverture. For this there is the authority of the dictum already referred to in *Parker v. Bleeke*, and *Touchstone*;(h) where the case of Baron Frevil, mentioned in *Flower v. Hill*, is referred to. Perhaps, therefore, this was really the point that was decided in that case.

If a rent descend upon the husband, his widow will be entitled to dower out of it, although he should have died before the arrival of a term for payment of the rent;(i) and by analogy, if the husband purchase a rent, and die before the arrival of a term for its payment, it is said that the widow will in this case likewise, be entitled to dower:(j) because the husband has had all the seisin of which the property was capable at the time.

A naked seisin without right, as, by a person having the freehold and inheritance by wrong, viz. a disseisor, abator, or the like, though it will not support a title to dower against the person having the just right, will do so against all persons claiming under the tortious possessor.(k)

Although seisin in the husband was necessary, in order to entitle the widow to dower, it was not necessary under the old law, except with regard to copyhold lands, that the seisin should have continued in him for any length of time, and still less that it should have continued until his death.

(e) *Uses and Trusts*, Vol. 2, p. 64.

(f) *Cro. Car.* 217.

(g) *Id.* 569.

(h) *Shep. Touch.* 227.

(i) 1 *Bro. Abr.*, Dower, 61, pl. 71.

(j) *Perk. sect.* 373; 1 *Bro. Abr.* p. 255, pl. 71.

(k) *Bro. Abr.*, Dower, pl. 59; *Perk. sect.* 394.

So long as the object and effect of the seisin was not to vest the estate for the purpose of divesting it, *uno flatu*, seisin for a period of time, however short, was sufficient to support dower, as in *Broughton v. Randall*, where the husband had an estate for life, with a remainder in fee after an interposed estate in tail in favour of his son; the moment of time which the husband survived the son was held sufficient *to unite the freehold [250] and inheritance in the husband, and to entitle his widow to dower, although the fact of the father having survived was shown by the mere circumstance of his having moved his limbs after motion in the body of the son had ceased, both of them having been executed together. (l) If, however, the object of an instantaneous seisin in the husband had been merely conveyance, and not to invest in him any beneficial interest, as where he was conusee of a fine, his widow would not have been dowable; (m) or where the husband, as lord of a manor, accepted a surrender of copyholds for the purpose of a regrant to the surrenderee. (n)

With regard to gavelkind lands, the law, before the statute as to the duration of the seisin in the husband necessary to support the title to dower, was the same as in regard to lands of ordinary tenure. Dower, therefore, attached upon all gavelkind lands of which the husband had been seised at any time during the coverture, although he should have aliened them by conveyance to take effect in his lifetime. (o) With regard to copyholds, the matter was at all times different. The estate of freebench, the name given to the estate in copyholds, corresponding to that of dower in lands of freehold tenure, depends for its very existence upon the custom of the particular manor in which the lands out of which it is claimed may be situate; the seisin, therefore, upon which it rests must necessarily have the same dependance. In some manors, the widow is entitled to freebench of all land within the manor of which the husband was seised at any time during the marriage, without regard to his continuing seised at the time of his death. (p) But in the absence of proof of a special custom *to that effect, the freebench is limited to such copyhold lands [251] as the husband was seised of at the time of his death. (q) The title of the widow, therefore, does not, as in the case of lands of freehold tenure, commence with the marriage, but has existence only after the death of the husband. (r) The necessary consequence is, that the title was at all times liable to be defeated by the conveyance of the husband, as it still is; and for this purpose, a bare surrender to take effect in his lifetime is sufficient, although the surrenderee may not have been admitted until after his death; (s) for the surrender and admission are only different parts of the same conveyance, of which the surrender is the *substantial* part, directing and governing the admission, which is only the *formal* part, material to the lord in respect of his fine, but mere form as between the tenant and a purchaser from him. (t) Although, therefore, the husband, where the surrenderee

(l) *Noy*, 64; *Cro. Eliz.* 503.

(m) *Co. Litt.* 31, b; *Nash v. Preston*, *Cro. Car.* 191; *Dixon v. Harrison*, *Vaugh.* 41.

(n) *Sneyd v. Sneyd*, 1 *Atk.* 442.

(o) *Davies v. Selby*, *Cro. Eliz.* 825; 2 *Watk.* on Copy. 60, n.

(p) *Scriv. on Copyholds*, 90.

(q) *Godwin v. Winsmore*, 2 *Atk.* 525; *Wood v. Lambirth*, 1 *Ph.* 11.

(r) *Benson v. Scott*, 1 *Salk.* 185.

(s) *Benson v. Scott*, *Carth.* 275.

(t) *Roe v. Griffiths*, *Burr.* 1961; *Vaughan v. Atkyns*, *Id.* 2785.

from him has not been admitted, does in truth die seised of the lands, it is only of a defeasible estate, liable to be destroyed by the admission of the surrenderee, which has relation back to the time of the surrender, so as to defeat all mesne acts of the husband, and with them this customary estate of freebench, which, as before observed, commenced only with his death.(u) So, where the custom required that the husband should have died tenant of the manor in order to entitle his widow to freebench, it was held, that it was barred by a bargain and sale of the lands by the commissioners under the bankruptcy of the husband, although he died prior to the inrolment, because the admittance of the bargainee after the husband's death drew back by relation to the date of the bargain and sale, to vest the lands in the bargainee as at that time.(v) So far, therefore, as regards *the seisin in copyhold lands, it will be observed, from what has been said, that [*252] the law upon this subject, prior to the Dower Act, was the same as that statute has now made the law in regard to the seisin in lands of freehold tenure, by giving husbands a right to defeat dower by alienation or declaration, and thereby placing the right to it entirely within their power.

It has been seen(w) that the husband has a right to curtesy in property capable in its nature only of *equitable* seisin. But, previous to the Dower Act, it was not so in regard to the right of the widow to dower. To give a title to dower, it was necessary that the seisin in the husband should have been a *legal* seisin. There could not, therefore, have been dower of a trust estate, or of an equity of redemption and the like.(x) No doubt, in *Otway v. Hudson*,(y) where the legal estate ought to have been in the husband, as the trust was to convey to him at a time which arrived within the coverture, and the husband did what he could to obtain the conveyance, but was prevented by the perverseness of the trustees, the widow was found to be entitled to dower; and in *Banks v. Sutton*,(z) where the husband had omitted to do what he could to obtain the conveyance, and thereby committed a fraud upon the wife, who married him with the expectation of his acquiring this estate, the widow was also held entitled to dower. In both of these cases, therefore, dower was made to attach, although the husband had but an equitable right. This was rested upon the principle, that equity considers that as having been done which ought to have been done. But in *Forder v. Wade*(a) dower was refused, although the time at which trustees should have conveyed to the husband may be presumed to have passed in the husband's life, as *the trustees were to convey to the husband upon payment of certain legacies, and no question was raised [*253] that these legacies had not been paid. This case, therefore, throws a doubt upon *Otway v. Hudson* and *Banks v. Sutton*, which is strengthened by the dicta of eminent judges, in regard to the right of the widow to dower out of money directed to be converted into land.

According to the equitable principle which has been noticed, if money have been given with a direction to convert it into land for the benefit of

(u) *Benson v. Scott*, ubi supra.

(v) *Parker v. Bleeke*, Cro. Car. 568.

(w) Ante, pp. 152, 160.

(x) See the reasons for the distinction in this respect between curtesy and dower explained in *Darcy v. Blake*, 2 Sch. & Lef. 387.

(y) 2 Vern. 583.

(z) 2 P. Wms. 700.

(a) 4 Bro. C. C. 520.

the husband, his widow should be entitled to dower out of the money *as land*, and such is actually the case in regard to the curtesy, where the conversion has been directed for the benefit of the wife; (b) but there are dicta of Lord Hardwicke, that the Court does not "give that indulgence" (the benefit of the equitable principle in question) "in the case of dower;" (c) and that the principle "holds in every case except in dower;" (d) and in *Fletcher v. Ashburner*, (e) Sir T. Sewell, M. R., while commenting upon the decision in *Sweetapple v. Bindon*, said, that the wife, in a similar case, was not entitled to dower, adding, "yet it is allowed, that it is so held, because cases have been determined, and not from any principle."

The weight of authority, therefore, seems to shew, that, in cases coming under the law as it existed prior to the Dower Act, (f) an equitable seisin would not have supported a title to dower. That act, however, has changed the law in this respect as to cases coming within its operation, by giving a right to dower out of equitable estates, as has been seen more at large when the nature of property subject to dower was spoken of.

[*254] *§ 3.—*Of the Estate in the Husband necessary to give a Title to Dower.*

By the 4th section of the Dower Act, (g) it is enacted, that dower shall not be claimable out of "any *land* which shall have been absolutely disposed of by the husband in his lifetime or by his will;" and "*land*" is by the statute declared to extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower,) and to any share thereof. There cannot, therefore, be any claim for dower by a widow who was married subsequent to the 1st of January, 1834, (the case to which the statute applies,) out of land which her husband, although seised of it at one time during the coverture, had aliened in his lifetime or devised by his will.

But, according to the law as it existed prior to the statute of Will. 4, and which is the law that will still regulate the rights of widows who were married prior to or on the 1st of January, 1834, the right to dower attached upon every property, by its nature subject to dower, of which the husband was seised at any time during the coverture, though he might have parted with it by sale or otherwise before his death. And even in the case of the husband of a widow who was married subsequent to the 1st of January, 1834, although, if he shall have either aliened his lands or devised them by his will, there will be an end to any claim for dower out of them; yet, if he shall have done neither of these acts, the rights of his widow, in regard to her dower, will be regulated by the same rules, as to the kind and quantity of estate which must have been in her husband in order to support her claim to dower, as are applicable to the case of widows who were married prior to or on the 1st of January, 1834.

(b) *Sweetapple v. Bindon*, 2 Vern. 536.

(c) *Cunningham v. Moody*, 1 Ves. sen. 176.

(d) *Crabtree v. Bramble*, 3 Atk. 687.

(f) 3 & 4 Will. 4, c. 105.

(e) 1 Bro. C. C. 499.

(g) *Ibid.*

*The next subject to be considered, therefore, is the nature of the estate, as to kind and quantity, of which the husband must [255] have been seised in order to entitle the wife to dower in cases not coming under the Dower Act.

As already mentioned, (h) in order to entitle the widow to dower, the issue which she by possibility might have had by the husband, must be such as by possibility might have been entitled to inherit, as heirs of the husband, the land out of which the dower is claimed. It is obvious, therefore, that the estate of which the husband was seised must be such as will embrace this possibility. Thus, if the estate of the husband in the land were in special tail, or to the heirs of his body by A. begotten, should he die without issue, A. would, nevertheless be entitled to dower; because she might by possibility have had issue by the husband, and such issue would have been his heirs in the lands per formam doni; but if the husband had survived A. in the case supposed, and had married B. as his second wife, and thereafter died, leaving B. surviving, B. would not be entitled to dower out of the lands; for, although she might have had issue by the husband, such issue could not by possibility have been his heirs in the lands, for the inheritance per formam doni was confined to the issue of the marriage with A. (i)

It may be, that the beneficial interest alone was in the husband, and that the legal estate was in another party; will, then, the widow of the cestui que trust be entitled to dower out of the lands? In regard to all widows married subsequent to the 1st of January, 1834, the Dower Act (k) enacts, that "when a husband shall die beneficially entitled to any land, for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal *to it, [256] other than an estate in joint tenancy, then his widow shall be entitled in equity to dower out of the land." With regard, on the other hand, to widows who shall have been married prior to or on the 1st of January, 1834, the law as to them remains as it did prior to this statute. The rule, that, in order to entitle the wife to dower, there must have been in the husband a seisin of the estate out of which the dower is claimed, should necessarily have excluded a claim for dower where the legal estate was in another, and all that was in the husband was an equitable right. Accordingly, it is recited, in the Statute of Uses, (l) that "by uses men lost their tenancies by the curtesy, and women their dowers." After the invention of trusts by Courts of equity, it was supposed, by the profession, that there could not be dower of a *Trust*, any more than there could have been dower of a *Use* prior to the statute. After trusts had been well established, the Courts of equity resolved to follow the law in regard to trust estates; and, if this rule had been carried out to all its consequences, the effect would have been, that, wherever dower would have attached upon the estate, had it been legal, the Courts of equity must have decreed it to attach upon the estate, where it was merely equitable. So many titles, however, had been framed upon the understanding of the profession, to which allusion has been made,

(h) Ante, p. 240.

(k) Sect. 2.

(i) Litt. sect. 53; *Amcotts v. Catherick*, Cro. Jac. 615.

(l) 27 Hen. 8, c. 10.

that there was no dower of a trust, that the Courts of equity found it necessary to make dower an exception from their rule of acting upon trusts by analogy to law. Accordingly, notwithstanding a contrary opinion of the Court in *Banks v. Sutton*,^(m) it was established by a series of decisions, beginning with *Chaplin v. Chaplin*,⁽ⁿ⁾ that the widow of a mere cestui que trust was not dowerable; although the trust might not have been created by the husband with an intention to bar dower, but by the ancestor of the husband,^[*257] or by third parties, where such an intention was not so presumable, there being no ground for any distinction in this respect,^(o) as was supposed by Sir Thomas Sewell in *Banks v. Sutton*.^(p) If the equitable estate of the husband were in customary or copyhold land, the same consequence in regard to dower followed as where the estate was in fee-simple land—the widow was not dowerable.^(q)

The law being thus settled, that the widow of a cestui que trust was not entitled to dower, it followed necessarily, that where lands out of which dower was claimed were the subject of mortgage in fee, whereby the legal estate was vested in the lender of the money, and only an equitable right of redemption left in the proprietor of the land, the widow of the mortgagee could not be entitled to dower.

No doubt, in *Banks v. Sutton*,^(r) Sir T. Sewell, M. R., in an elaborate judgment, expressed an opinion that there was dower of an equity of redemption. But in *Casborne v. Scarfe*,^(s) Lord Hardwicke, while he determined that *curtesy* attached upon an equity of redemption in the wife, treating the equity as an estate and not merely a right, and the possession of the lands and receipt of the rents as an equitable seisin in the wife by the husband in her right, nevertheless laid it down as even then well established, that a woman could not have *dower* of an equity of redemption. Lord Hardwicke admitted the difficulty of accounting for the distinction in this respect between *curtesy* and dower; and observed, in answer to the argument, that there could not be *curtesy* because there was not dower, that, if there was to be any innovation, “the nearest way to right would be to let in the wife to dower of a trust estate.” It is singular, therefore, to discover that the proposition, *that there is no dower of an equity^[*258] of redemption, assumed as being established, was rested on a case of *Reynolds v. Messing*, decided in 1732, which, in *Dixon v. Saville*,^(t) it is said, does not, upon reference to the Registrar’s Book, warrant the point said to be determined by it; and on an opinion of Lord King, in *Robinson v. Tonge*,^(u) which could only have been given obiter, and is not to be found in the report of the case: while, on the other hand, no reference appears to have been made to the elaborate judgment of Sir T. Sewell in *Banks v. Sutton*,^(v) already referred to, that there is dower of an equity of redemption in fee, a judgment in which, after having reviewed various authorities, he said “he did not know nor could find any instance where dower of an equity of redemption was controverted and adjudged against the dowress;” and yet Sir T. Sewell was the judge by whom had been

(m) 2 P. Wms. 700.

(n) *Godwin v. Winsmore*, 2 Atk. 525.

(o) *Godwin v. Winsmore*, 2 Atk. 525; *Forder v. Wade*, 4 Bro. C. C. 521.

(p) 2 P. Wms. 708.

(q) 1 Atk. 603.

(t) 1 Bro. C. C. 327.

(u) *Vin. Abr.* 145, pl. 28.

(v) 2 P. Wms. 700.

(s) 3 Id. 229.

(p) 2 P. Wms. 708.

decided, only two years before, the case of *Reynolds v. Messing*, which is represented as having controverted this. Nevertheless, in *Dixon v. Saville*,^(w) the Lords Commissioners decided against the dower, "thinking it so much settled that it would be wrong to discuss it much." As no further reasons were given for this judgment but the observation of Lord Loughborough, that "the case of an estate by the curtesy in a trust was an anomaly," referring obviously to *Casborne v. Scarfe*, and the arguments of counsel were rested mainly on the well-ascertained doctrine, that the widow of a cestui que trust could not have dower of the estate in trust, it may be inferred, that the Lords Commissioners treated the equity of redemption as a mere equitable right, and disregarded the doctrine laid down by Lord Hardwicke in *Casborne v. Scarfe*, upon which his decision of that case in favour of the curtesy was founded, viz. that the equity of redemption [*259] was not a mere right, but an estate of which there might be a seisin, and of which, in that case, he thought there had been an equitable seisin.

Whether this decision in *Dixon v. Saville* rested upon then established doctrine, or upon correct principle as a true foundation, or not, from that time forth at least it has been received by the profession that a widow is not dowerable of an equity of redemption;^(x) and this may be considered to be the law in regard to all widows whose marriage took place prior to or upon the 1st of January, 1834. With regard to those whose marriage was subsequent to that date, they will be entitled, under the 2d section of the Dower Act,^(y) to dower out of lands mortgaged by their husbands, where the mortgage was not foreclosed at the husband's death; but their right will be confined to dower of the estate which was in the husband at his death: that is, of the equity of redemption, or of the lands subject to the debt which the husband has by the mortgage charged upon them; for, by the 5th section of the statute, it is declared, that "all partial estates and interest, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower."

We have seen that the widows of a cestui que trust and of a mortgagor are neither of them dowerable. Will, then, the widow of the trustee and of the mortgagee of the lands, held upon the trust or under the mortgage, be entitled to dower? The Dower Act, it may be observed at the outset, has not made any change upon the law in this respect as it existed prior to the passing of that statute. It continues the same, therefore, as to all widows, whether married prior or subsequent to the 1st of January, 1834.

*With regard to the right of the widow of a trustee to dower, it was decided in *Noel v. Jevon*,^(z) that the widow of a trustee was [*260] barred of her dower as "the constant practice of the Court;" and in *Bevant v. Pope*,^(a) the widow of a person to whom copyholds had been surrendered in trust for another, was decreed not to be entitled to dower "more than the wife of a trustee, for the widow's estate springs out of the trust estate by the custom, as dower doth by the common law." The principle of this

(w) *Ubi supra*.

(y) 3 & 4 Will. 4, c. 105.

(x) *Darcy v. Blake*, 2 Sch. & Lef. 388.

(z) *Freem. Ch. Ca.* 43.

(a) *Id.* 71.

is explained in *Hinton v. Hinton*(b) to be, that "the Court will not suffer the widow to take advantage of her title to dower at law of an estate of which her husband was seised merely as trustee, because it would be taking part of that estate, the whole of which was in another, and against conscience."

This rule will apply equally to the widow's right of *freebench* out of copyholds, where she is entitled to it by the custom; for, in the case of *Hinton v. Hinton*, which has been alluded to, the facts were: that the husband, being copyholder of a manor, by the custom of which the widow was entitled to freebench out of such lands as the husband died seised of, sold the lands and died after payment of the price but before he had surrendered them to the purchaser, who sued for specific performance of the contract discharged of the widow's freebench; the widow argued that freebench differed from dower in this, that the right to it arose from the custom, not from the husband, and, therefore, it could not be barred before actual surrender: but Lord Hardwicke, after observing that there were no authorities in equity, and reviewing those at law, to shew that the freebench was part of the husband's estate and in his power, decreed the wife to surrender her freebench, upon the ground that the husband, by the contract of sale, parted [*261] with the whole estate in equity, which would "consider the surrender which ought to have been made or having been made at the time it ought. A covenant to surrender for valuable consideration will be equally effectual to bar the freebench.(d) It may be observed, that the case of *Hinton v. Hinton* is useful for another purpose—to shew, both as to dower and freebench, that, where the husband had contracted to sell and the purchaser had paid the price, the husband is thenceforth a trustee for the purchaser, and the freebench or dower, as the case may be, of his widow will be barred.

With regard to the widow of a mortgagee, in whom the legal estate was vested prior to the coverture, and from whom the mortgage was not redeemed during the coverture, at law she certainly would be entitled to dower out of the lands in mortgage, so soon as the condition of the deed in regard to payment of the mortgage money had been broken.(e) But, according to two decisions of Lord Langdale, M. R., the widow of a mortgagee, in whom the title had become absolute by failure to pay, would not in equity be entitled to dower. In *Flack v. Longmate*,(f) the first of these cases, the widow of a mortgagee claimed dower under these circumstances:—Her husband had become entitled, in 1821, to lands under a mortgage, upon which interest had been received by his predecessors up to the year 1816, long after the time limited for payment of the mortgage-money had expired. In 1830, the husband died, his possession having continued up to that time without any further recognition of the mortgage having been made by him or his predecessors. By this time, the heir of the mortgagor could not be discovered. In these circumstances, Lord Langdale, M. R., rejected the claim for dower, because the estate in the husband,

(b) 2 Ves. sen. 631.

(d) *Brown v. Raindle*, 3 Ves. 256; *Wood v. Lambirth*, 1 Ph. 12.

(e) *Nash v. Preston*, Cro. Car. 190.

(f) 8 Beav. 420.

at the time *of his death, was subject to redemption, although it had subsequently by lapse of time become absolute in the person of [*262] his heir. As the widow of a mortgagee, if her claim to dower were allowed, would have to account for the rents of the part of the mortgaged lands assigned to her for dower as a mortgagee in possession, in case the mortgagor should seek to redeem, while she would not be entitled to set off any part of the mortgage money, which would go to the executor not to the heir of her husband, the case can seldom arise in which it would be for the advantage of the widow of a mortgagee to insist upon her dower. *Flack v. Longmate* is a curious instance of a case in which this was for her interest; and it is further curious as the only authority at the time in the shape of a decision for the proposition that the widow of a mortgagee is not entitled to dower: a proposition laid down by Roper, (f) and, it is believed, received among practitioners, but which is unsupported, so far as appears, by any decision, and is perhaps questionable upon principle. No doubt, the widow of a trustee is not entitled to dower, and for an obvious reason: it would be against all conscience that she should be able, as against the cestui que trust, the party having the beneficial interest, to take advantage of the rule of law which gives her dower of the estate in which her husband was seised, to deprive the cestui que trust so far of his own estate; and as a mortgagee has been said, not very correctly perhaps, to be a trustee for the mortgagor, this seems to have given rise to the idea that the widow of the mortgagee is also not entitled to dower. In the case of a proper trustee, the question as to dower does not occur between the widow and the heir of the trustee, but between her and the cestui que trust; whereas in the case of the mortgagee, for the purpose supposed to be a trustee, the *question does arise between the widow and the heir of the mortgagee or trustee. If the heir has a right to the possession and [*263] enjoyment of the lands quâ heir, why should not the widow have a right, as against him, to her dower? At law, the title of her husband was absolute, and her title was as good as the heir's. In equity, what has the heir to set up against her? The legal title is, no doubt, subject to defeasance in equity by the redemption of the mortgagor, but dower attaches upon a defeasible estate in the husband, provided the defeasance have not occurred in his lifetime. (g) Upon principle, there does not seem to be any difference between the two cases. Undoubtedly, in all questions between the *mortgagor* and *mortgagee*, equity considers the mortgagor as the owner of the land, and the mortgage as personal assets; but how it would lie in the mouth of the heir of the mortgagee, as in a question between *him* and the *widow* of the mortgagee, to urge this doctrine, is not very apparent; for if the mortgage is personal assets, how is the heir, and not the executor, entitled to possession of the lands?

It is one thing to say, that, if a widow of a mortgagee claim dower, she can only do so subject to the liability to account with the mortgagor as a mortgagee in possession, a liability to which her husband was and his heir is equally subject; and a totally different thing to say, that, as against the heir, she shall not be entitled to dower, although in his person the estate may become indefeasible and discharged of this liability, as in fact it did in

(f) Vol. 1, p. 357.

(g) Post, p. 270.

Flack v. Longmate. However, *Knight v. Frampton*^(h) is as strong an instance as can well be given of the doctrine that the widow of a mortgagee is not entitled to dower; for there the husband, who had an equitable title to the moiety of the lands as against the mortgagor of the whole, had acquired the lands by conveyance from the mortgagee after the time for the [*264] *payment of the mortgage money, yet, having thus in him the legal title to the whole, the seisin of the husband was subject to the equity of redemption; and, as to the moiety, there was not a simple and entire union of the legal and equitable estates. It is worthy of notice, however, that in *Nash v. Preston*,⁽ⁱ⁾ which was a case certified to Chancery, the Court held, that the widow of the mortgagee should have her dower, although the time for repayment of the mortgage money had not arrived. There, J. S., seised in fee of lands, sold them to the husband for £120, upon condition that he should redemise them to J. S. and his wife at a pepper-corn rent, and that the bargain and sale should be void if J. S. repaid the money within twenty years. The husband made the demise and died, (whether within the twenty years is not said, but it seems inferrible), and his widow claimed dower out of the lands. The Court of King's Bench certified that she ought to have dower, upon the ground, that, by the bargain and sale, the wife was entitled to dower, and that J. S. and his wife received the redemise subject to that title; and that, as there was no fraud or covin, a Court of equity ought not to relieve. On the whole, therefore, the authority of *Flack v. Longmate* and *Knight v. Frampton* is open to question; and, should a case again occur in which it would be the interest of the widow of a mortgagee to claim her dower out of the mortgage lands, these cases will probably not be considered as having conclusively settled the point against her claim.

Not only must the husband be seised of a beneficial estate, but the estate must be one of inheritance. Dower, therefore, is not claimable at common law out of copyhold lands, as in them the tenant has no greater estate than one at the will of the lord. Indeed, as to copyholds, the widow cannot have [*265] *any estate in them, unless the custom of the particular manor specially give it, in which case the estate is called her *freebench*.

If the husband had during the coverture but a particular estate, carved out of the inheritance, and not the entire inheritance itself, that will not be a sufficient estate whereon to support a claim for dower. Thus, if the husband, prior to the coverture, make a lease of the lands for the life of the lessee, reserving a rent to himself and his heirs, the widow will not be dowable of the lands if the husband die during the currency of the lease; for he had not during the coverture seisin of the freehold, either in law or in fact; neither will she be dowable of the rent reserved, for of that the husband had but a particular estate, which might have expired in his own life.^(k) If the rent had been reserved upon a gift in tail, the widow would have been dowable of the rent, which would have been a rent in fee, as it might have continued for ever.^(l) If, therefore, the husband be seised only of a reversion, which does not fall into possession during the coverture, or of an

(h) 4 Beav. 10.

(i) Cro. Car. 190.

(k) Co. Litt. 32, a; *Darcy v. Blake*, 5 Sch. & Lef. 387.

(l) Co. Litt. 32, a.

estate which is something short of the entire inheritance, he will not be seised of an estate which will support a right to dower. If, however, in the case which has been first suggested, the lessee for life had during the coverture surrendered his interest, the widow would be dowable of the land; for the surrender would let in the reversion, and the husband would have been thenceforth seised of the freehold(*m*) and inheritance. Instances might be multiplied as illustrations of the rule, that, in order to support a title to dower, the husband must have been seised of the entire inheritance; but one or two will be sufficient to make the application of the rule intelligible. Thus, if a vested remainder for life or in tail be *interposed between an estate for life in the husband and an ultimate remainder to him in fee or tail, his widow will not be dowable;(*n*) for the husband would in such case have been seised during the coverture of only a freehold estate, the intervention of the interposed remainder preventing the union of the estate for life with the estate in fee.(*o*) On the other hand, if the intervening estate should determine during the coverture by the death of the tenant for life or of the tenant in tail without issue, the widow would in that case be dowable; for the husband would then have had in him during the coverture both the freehold and the inheritance.(*p*) If, however, the intervening estate were only a term of years, though for such a term as would exceed the life of the husband, (as for ninety-nine years), the widow would be dowable, because the husband would have had both the freehold and inheritance in him, and might by a recovery have destroyed the intervening term, at his pleasure.(*q*) If the lands should have been devised to executors for payment of debts, and thereafter to the husband, the devise to the executors, being a mere chattel interest,(*r*) would not prevent dower of the lands, though the dowress could not have the benefit of her dower until the debts of the devisor were paid.(*s*) It must be remembered, however, that the widow may disagree to any estate given to her during the marriage. Should, therefore, the estate intervening between the husband's life estate and the remainder to him in fee be an estate to her, as where lands are given to husband and wife and unto the heirs of the husband, or the heirs of their two bodies, or to their heirs, she may waive or disagree to the joint estate and claim her *dower; for the effect of the waiver will be to make the husband to have been seised sole ab initio.(*t*) [*267] With regard to the mode by which the widow may disagree to the interposed estate given to her, she may do this effectually by deed under seal.(*u*) Perhaps, indeed, according to the opinion of Holroyd, J., in the case which has been cited, founded upon *Bonifant v. Greenfield*,(*v*) the fact of the widow suing for her dower would be sufficient evidence of her disagreement.

If the intervening estate, i. e. if the estate interposed between the estate for life given to the husband and the ultimate remainder to him in fee be a *contingent* remainder, which was destroyed by the descent of the inheri-

(*m*) Roll. Abr. 677, pl. 25.

(*n*) *Duncombe v. Duncombe*, 3 Lev. 437.

(*o*) *Doe d. Jones v. Jones*, 1 B. & C. 244; Perk. sect. 335.

(*p*) Perk. sect. 337.

(*q*) *Bates v. Bates*, 1 Raym. 327.

(*r*) *Boothby v. Vernon*, 9 Mod. 147; Co. Litt. 42, a.

(*s*) *Hilchins v. Hilchins*, 2 Vern. 403.

(*t*) *Butler v. Baker*, 3 Co. Rep. 27.

(*u*) *Townson v. Tickell*, 3 B. & Ald. 31.

(*v*) *Cro. Eliz.* 80.

tance upon the husband, as heir of another than the person by whose will the estate for life and the remainders were limited, the widow will be dowerable; for, the contingent remainder being destroyed by the descent of the inheritance, the life estate coalesces with the inheritance in the husband, and is drowned in the latter. (w) If the descent of the inheritance were from the *same* person by whose will the estate for life to the husband and the remainders were limited, the estate for life, according to *Plunkett v. Holmes*, (x) would not merge with the inheritance so descended, for that would be to destroy the remainders and defeat the object of the testator; and, according to *Cordal's case*, (y) the widow in such case would not be dowerable. But, in *Hooker v. Hooker*, (y) Lord Hardwicke said, that even if the contingent remainder were not destroyed, and that there was a possibility of the estates opening to let in the remainder, he did not think that [*268] would defeat the dower; for where a *remainder comes in, it shall work no wrong; and there were no cases against this except *Cordal's case*, which had several times been denied to be law. It would seem, therefore, that although the inheritance should descend upon the husband, as heir of the maker of the different estates, and therefore vest in him only sub modo, the widow would nevertheless be entitled to dower, more especially, if, as was the case in *Hooker v. Hooker*, the *possibility* of the contingent remainder arising had become, at the death or in the life of the husband, an *impossibility*.

If the particular estate and the inheritance by descent from the maker of the estate should have continued united in the husband until his death, and the contingency upon which the remainder would come into possession should at his death be a continuing possibility, it would seem, upon the same principles which influenced the decision of the Court in *Hooker v. Hooker*, that the widow would nevertheless be entitled to dower. But, in either case, the estate of the widow in her dower would, it is apprehended, be as defeasible as the husband or the heir's estate was in the inheritance. So soon as the estate in the inheritance is defeated by the contingent remainder coming into possession, the dower would fall with it.

Upon the same principles which have been noticed, if the husband had been tenant in tail after possibility of issue extinct, and an estate in fee or in fee tail, in reversion or remainder, had descended or come to him during a second coverture, the tenancy would be merged in the fee, and his widow would be entitled to dower. (a)

When land is limited to such uses as the husband during his life shall appoint, and in default thereof to himself for life, and after his death to his heirs, the fee is vested in the husband, subject to be divested by his execution of the *power; (b) and should the power not be executed during [*269] the coverture his widow will be dowerable. (c) But should the power be executed by the husband, the widow will not be entitled to dower; for,

(w) *Hooker v. Hooker*, Ca. temp. Hardw. 13; *Crump d. Wooley v. Norwood*. 7 Taunt. 362.

(x) 1 Lev. 11.

(y) *Cro. Eliz.* 315.

(z) Ca. temp. Hardw. 13.

(a) *Bowles's case*, 11 Co. Rep. 79; 1 Bro. Abr. 677, pl. 7; Co. Litt. 28, a.

(b) *Cox v. Chamberlain*, 4 Ves. 636; *Maundrell v. Maundrell*, 10 Ves. 265.

(c) *Ibid.*; and 7 Ves. 566.

as the estate given to the appointee by the execution of the power takes effect as if it had been inserted in and given by the deed creating the power, and quasi the act of the donor of the power, the fee in the husband is thereby divested, and with it falls the estate of dower, which, being derivative from the estate of the husband, necessarily partakes of its defeasible nature, as has been seen where the dower was defeated by the coming into possession of a contingent remainder.(d)

Another instance, in which the widow is not entitled to dower, is where the husband's estate was a *joint tenancy*, and he predeceased his co-tenant, and for two reasons: first, because the husband was at no period of the coverture seised solely of the entire inheritance;(e) and, secondly, because dower, being derivative from the title of the husband, is over-ridden by the right of survivorship in the surviving tenant, with which the husband's title was qualified ab initio.(ee) It is hardly necessary to observe, that if the husband were the surviving joint tenant, his widow would be dowable.(f) From the death of the co-tenant the husband would be seised of the entire inheritance. If, during the life of both tenants, the husband alien his moiety, although that will sever the tenancy, so as to destroy the right of survivorship in the co-tenant as to his moiety, yet the widow will not be dowable of this moiety; for, prior to the new estate created by the severance, the *entire inheritance of it was not in the husband, nor was the new estate ever in him at all.(g) [270]

Where the estate of the husband was a tenancy *in common*, the widow will be dowable of her husband's moiety, for each tenant in common has a several freehold and inheritance of his moiety which descends to his heirs.(h)

It is no objection to the widow's claim for dower, that, although her husband was seised of the inheritance, his estate was nevertheless defeasible, so long as the defeasance has not happened;(i) thus, if tenant in tail had conveyed the lands by fine, which would bar his issue in tail, the widow of the purchaser from him would be dowable during the existence of issue of the tenant in tail, although, upon failure of the issue, those entitled in remainder, after the determination of the estate tail, would be entitled to take the lands discharged of the conveyance to the purchaser and of the dower of his widow.(k) Nay, if tenant in tail had conveyed the lands by lease and release, which would be voidable by entry of the issue in tail, the widow of the releasee will be entitled to dower during the life of the tenant in tail, and until entry by the issue;(l) or, if the tenant for life had granted his estate upon condition to the husband entitled to the reversion, whereby the freehold and inheritance were united in the husband, his widow will be dowable so long as the condition is not broken;(m) or, if tenant in tail should have had made a discontinuance, and the widow of the discontinu-

(d) Ray v. Pung, 5 B. & Ald. 561.

(e) Litt. sect. 45.

(ee) Co. Litt. 30 b. and 37 b.

(f) Broughton v. Randall, Cro. Eliz. 503.

(g) Co. Litt. 31, b.; Sneyd v. Sneyd, 1 Atk. 442.

(h) Co. 37, b.

(i) Bro. Abr. 677, H. 1, 2.

(k) Case of Fines, 3 Co. Rep. 84 a; Seymour's case, 10 Id. 96, 98.

(l) Seymour's case, 10 Co. Rep. 96; Neville v. Rivers, 7 T. R. 278.

(m) Bro. Abr. 677, G., pl. 12.

should be endowed of a third of the lands, and afterwards the issue in tail should recover this third, the widow would be entitled to dower out of the [*271] *remaining two-thirds, until the issue in tail should recover them likewise from the heir of the discontinuee.(o)

Assuming the husband to have been seised of an estate out of which dower was payable, but which had itself determined in his lifetime or at his death, the question naturally suggests itself—what is the right of the widow in such a case? The answer will be best understood by keeping in view the nature of the estate of dower, that, like curtesy, “it is not derived merely out of the estate (of the husband,) but is created by the law by privilege, and benefit of law is annexed to the gift to him,”(p) and is quodammodo a continuance of part of the estate of the husband. If, therefore, the fee, which was in the husband, is defeated by a title paramount to his, the necessary consequence is, that the widow’s dower, as part of his estate, is likewise defeated. Thus, if the husband were a disseisor, the entry of the disseisee upon him would defeat his widow’s dower; nay, if the husband should have died seised, so that the entry of the disseisee was tolled by the descent upon the heir of the husband, such entry, if the widow of the disseisor were endowed, would not be tolled as to part of the lands of which she was endowed, although it would be as to the parts in the hands of the heir; for the widow would be in immediately by her husband, and not by the heir,(q) which is curious as an instance shewing that dower will defeat descent.(r)

On the other hand, if lands be given in tail to the husband, although, by his death without issue, his estate is at an end, and, so far as regards him or his issue, those entitled in remainder would have a right to enter; yet, as an estate of dower to his wife was, by law, implied to form part of the estate given to the husband, dower will attach upon the estate in the hands [*272] of those entitled in remainder after the *failure of the estate tail to the husband.(s) So, if the gift be of an estate in fee simple, with a contingent limitation over, in the event of the husband dying without issue, the widow will be entitled to dower, although the husband should have died without issue.(t) In the cases which have been stated, the widow was within the predicament which, according to Littleton,(u) entitled her to dower: her husband was seised of such an estate, so as by possibility it might happen that she might have had issue by him, which by possibility might inherit the estate.

If a rent were reserved upon a gift of lands in tail, and both the donor and the tenant were to die, the latter without issue, the rights of their respective widows are worthy of consideration. The tenancy in tail would be at an end, together with the rent reserved upon it, for nobody would remain from whom the rent could be demanded; yet the widow of the tenant would be dowable out of the lands, although the widow of the donor could not be endowed of the rent which had ceased to exist;(v) but the

(o) Perk. sect. 420.

(p) Paine’s case, 8 Co. Rep. 71.

(r) Gilb. Dower, 395.

(t) Buckworth v. Thirkell, 3 B. & P. 652, n. (e); Moody v. King, 2 Bing. 447.

(u) Sect. 53.

(q) Litt. sect. 393.

(s) Perk. sect. 317.

(v) Fitz. Nat. Brev. 149, G.

widow of the tenant would be subject to pay a third of the rent to the heir of the donor.

When it is said, that, in order to entitle the widow to dower, the husband must have been seised of an estate of inheritance, this must be received with the qualification that the estate need not, in fact, be of this nature, where the party objecting to the nature of the estate derives his title through the husband, on the assumption that the estate was of this nature. Thus, if the husband, having, in fact, only an estate for life, or other shorter period, assume to deal with the property as if he had an estate of inheritance—for instance, by conveying the fee—the widow will be dowable as against those who derive title through this dealing.^(w) *In Bro. [*273] Abr.^(x) it is said, that, “if a tenant for life make a feoffment in fee, and die, his widow will not have dower; for, as he never was seised in fee, he could not give a fee simple by alienation.” This, as Roper^(y) suggests, must be understood as against those having the inheritance, after the expiration of the husband’s estate for life; for, as against the feoffee of the husband, he is estopped from saying that the husband could not give a fee simple.^(z) On the other hand, those entitled to the inheritance after the husband’s estate for life, are no way hindered from shewing what the nature of that estate was, and that it was not sufficient to support, as against them, the claim for dower. If the widow of the tenant for life, assuming to grant the fee, will be dowable as against the feoffee of the husband, it would seem, upon principle, that the widow of the feoffee will also be dowable, as against those claiming under the feoffee, so long as those entitled to the lands, after the expiration of the feoffor’s (the husband’s) estate for life, shall not assert their right.

CHAPTER IV.

HOW RIGHTS OF WIDOW IN HER DOWER AND OF THIRD PARTIES HOLDING INTERPOSED ESTATES ARE ADJUSTED.

THE effect upon the right to dower of an estate interposed between the husband’s estate for life, and a remainder in fee in him, has been already spoken of.^(a) We shall now consider how the interests of the party entitled to the interposed *estate, and of the dowress, are to be adjusted. [*274] If the interposed estate be a term upon which a rent has *not* been reserved, the widow will be dowable no doubt, but with a cessat executio during the term;^(b) and if it be a term upon which a rent *has* been reserved, she will be dowable of the reversion and of a third of the rent as incident to it.^(c)

(w) Taylor’s case, cited in *Blundell v. Baugh*, Sir W. Jones, 317.

(x) Fol. 260, pl. 30.

(y) Vol. 1, p. 368.

(z) Anon., 12 Mod. 399.

(a) Vide ante, p. 266.

(b) Roll. Abr. 678, H., pl. 6; *Lindsey v. Lindsey*, Salk. 291.

(c) Ibid. pl. 7.

If the term interposed had been a satisfied mortgage, the widow was always, *in equity*, entitled to have it removed out of her way, ^(d) as against *the heir or devisee* of her husband, (though not as against an assignee for value.) ^(e) And if the term had been one to attend the inheritance, for the purpose of raising provisions for younger children, which had been satisfied, the widow had in equity the benefit of the term as part of the inheritance. ^(f) If the mortgage were not satisfied, although the widow would have been instantly dowerable, yet it was on the condition of keeping down the interest of a third part of the mortgage debt; ^(g) but if the mortgagee had not taken possession, the heir could not have set up the mortgage against the claim for dower. ^(h) The same effects in favour of the dowress are now accomplished *at law* by the operation of the 8 & 9 Vict. c. 112. It has been said in two cases, that, if the dowress choose, she may redeem a mortgage. ⁽ⁱ⁾

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*CHAPTER V.

OF ELECTION BY THE WIDOW AS TO TAKING HER DOWER WHERE ONE OF TWO PROPERTIES IS SUBJECT TO IT.

IN certain cases it is necessary for the wife to make an election out of which of two properties she will be endowed. Thus, if the husband exchange lands for others, the widow must elect which of the two she will prefer, though the husband was seised of both during the coverture. ^(a) Yet if she have joined with her husband in conveying away the lands *received* in exchange, whereby she has barred herself from claiming dower as to these lands, this would not bar her from claiming dower out of the lands *given* in exchange. ^(b) Again, Perkins says, ^(c) "If a man seised of a rent-charge in fee take a wife and purchase the land whereout the rent is issuing and dieth, it shall be at the liberty of the wife to be endowed of the land or of the rent." It would be unreasonable that the widow should have dower of a rent-charge and also of the land out of which the rent is issuing; allowing her to choose between the two is not so much giving the wife an election as refusing her dower twice out of the same property, which would, in fact, be the case if she could claim dower not only of a rent, but of the land out of which the rent is issuing, at least where the rent bears a relative proportion to the yearly value of the land. If the rent is insigni-

^(d) *Hitchin v. Hitchin*, Pre. in Ch. 133.

^(e) *Radnor v. Rotheram*, Pre. in Ch. 65; *Maundrell v. Maundrell*, 7 Ves. 577.

^(f) *Ward v. Dudley*, Pre. in Ch. 241; *Williams v. Wray*, 1 P. Wms. 138.

^(g) *Squire v. Compton*, 2 Eq. Ca. Abr. 387.

^(h) *Hamilton v. Mohun*, 1 P. Wms. 121.

⁽ⁱ⁾ *Palmer v. Danby*, Pre. in Ch. 137; *Hill v. Adams*, 2 Atk. 209.

^(a) Perk. sect. 319.

^(b) Anon., 1 Leo. 285.

^(c) Perk. sect. 320; but see sect. 324.

ficient compared with the yearly value, the widow has only to disregard the rent and take to the land.

It may be that the husband has had during the coverture *different *estates* at different times in the same land. In such case also [*276] the widow may elect of which estate she will be endowed, unless, indeed, she have barred herself by her course of proceeding. Thus, if the husband were first seised in fee, and then made a feoffment, and afterwards took back an estate-tail and died, the widow may elect whether she will be endowed of the estate in fee or in tail, unless, in a recovery of dower against the heir, she have surmised that her husband died seised, and pray for damages, which could only apply to the estate of which the husband had died seised, which was the estate-tail. In that case she would have elected to take the estate-tail, and would thus take subject to any charges which the husband might have created while he had the estate in fee. Or, if, in the case supposed, the widow had joined her husband in conveying the estate in fee, she would be barred from electing to take her dower out of that estate, and would be confined to the estate-tail. It is therefore of importance for the widow to be well informed as to the history of her husband's property, before making her election as to the seisin of which she will be endowed.

The death of the husband is the time when the title to dower becomes consummate, and the widow must make her election; anything, therefore, which she may have done during the coverture, will not be construed to have been done in exercise of this right. Thus, where a wife had joined with her husband in conveying by fine lands which had been received by the husband in exchange for others, of which the husband had been seised in right of the wife, it was found that the circumstance of the wife having joined in the fine, and thereby barred her claim for dower out of the lands received in exchange, did not amount to an election to take these lands and release her right as to them; and that she was at liberty to recur to the lands given in exchange, and claim dower of them.(d)

*CHAPTER VI.

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RIGHTS AS TO DOWER WHERE THE WIDOWS OF CONSECUTIVE OWNERS CLAIM IT OUT OF THE SAME LANDS AT THE SAME TIME.

QUESTIONS of some nicety arise where there are widows of consecutive owners claiming dower out of the same lands. A few observations, coupled with what has already been described as necessary to give a title to dower, will shew the rights of the respective parties in any given case of this kind. If there should be grandfather, father, and son, and the grandfather should die seised of lands which thus descended upon the father, if the grand-

(d) Anon., 1 Leon. 285; Dyer, 358, b.

mother were endowed of the lands by the father, who thereafter died in the life of the grandmother, the mother would not be dowerable out of more than the two-thirds of the land which remained after satisfying the dower of the grandmother; and her right would be so limited not only during the life of the grandmother, but after her death; for the seisin of the father, as to the other third, was defeated by the endowment of the grandmother; so that, as to this third, the father had not during his life more than a reversion expectant upon a freehold, which is not such an estate as would support a title to dower.(a) This third was in tenure of the grandmother during the life of the father, so that he was never seised of it.(b) If, however, the case supposed had been altered in its circumstances to this extent, that the grandmother died in the life of the father, then the mother would be dowerable out of the entire lands; for the tenure of the third by the [*278] grandmother would *thus be determined in the life of the father, who would thereby become seised in possession of the whole.(c) If, again, in the case *first* supposed, the grandfather had enfeoffed the father, although the grandmother would of course, prior to the 3 & 4 Will. 4, have been dowerable out of the land, the effect of the feoffment would have been to entitle the mother to dower out of the entirety upon the death of the grandmother; for the seisin of the father took effect in the life of the grandfather before the tenure of the grandmother upon her dower: so that the father's seisin was not defeated by the endowment of the grandmother except as to her,(d) and only as to her to the extent of burdening it with an estate for life.(e)

The mere existence of a right of dower in a prior widow will not prevent the second widow being endowed so long as the first widow does not assert her right; at least such seems to be the import of a case in *Vernon*.(f) This opens up another consideration in regard to the effect of priority of actual assignment of dower upon the rights of consecutive widows. If dower have been assigned to the mother, while as yet no assignment has been made to the grandmother, although the grandmother will be entitled to be endowed when she demands it, her endowment, supposing the father to be dead, will not have the effect of defeating the dower of the mother as to a third; which it would have had, as above shewn, if it had been prior to the endowment of the mother: it will only suspend her right as to that third, and on the death of the grandmother, the mother will have a right to enter again to the land recovered by the grandmother,(g) "because," as is said by Coke,(h) "the mother had in it an estate for term of her life; and the estate for the life of the grandmother is lesser in the eye of the law as to her than her own life."

*The inference from all the books is, that where there are several [*279] widows, each is endowed according to the priority of the estate in the husband through whom she claims, and that each takes dower of such part of the land as remains after satisfying the dower of those entitled in priority, subject to be enlarged by their death, according as these prior endowments may or may not have defeated the estate of the husband through

(a) Co. Litt. 31, a.; Gilb., Dower, 394.

(b) Gilb., Dower, 395.

(c) Gilb., Dower, 395.

(d) Co. Litt. 31, a.

(e) Gilb., Dower, 396.

(f) *Hilchins v. Hilchins*, 2 Vern. 403.

(g) Perk. sect. 316.

(h) *Ibid.*

whom the right exists, according to the doctrines which have been already explained.

CHAPTER VII.

ASSIGNMENT OR SETTING OUT OF DOWER.

If it be in any way certain (as it was in dower ad ostium ecclesie, or ex assensu patris, while these species of dower were allowed,)(a) what part of the property the widow should enjoy for her dower, she may at once enter upon it.(b) Otherwise she cannot enter until dower is assigned to her;(c) but this should be done immediately and within the quarantine. It is not necessary that assignment should be in writing, whether it be of lands or of rents issuing out of land; neither is it necessary that there should be livery of seisin, not even where the assignment is of an undivided third part, for dower is due of common right.(d)

§ 1.—By whom Assignment of Dower may be made.

With regard to the party by whom dower may be assigned, when the widow does not resort to her legal remedy, *this cannot be done by any one who has not a freehold interest in the land, or against whom [*280] a writ of dower would not lie.(e) Therefore tenants by elegit, statute staple or merchant, or for term of years, who have no more than a chattel interest, cannot assign dower;(f) neither can a *guardian in socage*, who has only such an interest, and against whom a writ of dower will not lie.(g) The proper person to assign dower is the heir or other tenant of the land.(h) If the heir be under age, he may nevertheless make the assignment, because he is compellable by brief,(i) and the parol cannot demur for the favour that is shewn to dower, lest the widow should be deprived of her sustenance.(j) If the land be held by joint tenants under a devise or conveyance from the husband, one of the tenants alone may assign dower, for they are all compellable by law,(k) and the assignment will bind the co-tenants.(l) Nay, if the freehold be held tortiously, as by a disseisor, abater, or intruder, an assignment of dower by him will be good, if he have not obtained the freehold by covin with the widow.(m) If the freehold has been obtained by covin of the widow, then the disseissee may avoid the assignment by entry

(a) Litt. sect. 39.

(b) Id. 43.

(c) Co. Litt. 34, b.

(d) Co. Litt. 35, a; Booth v. Lambert, Sty. 276; Rowe v. Power, 2 B. & P., N. C. 34.

(e) Co. Litt. 35, a.

(f) Perk. sect. 404.

(g) Co. Litt. 35, a.

(h) Co. Litt. 34, b.

(i) 1 Roll. Abr. 681, T. 1.

(j) 1 Roll. Abr. 137, B. 1; Jenk. Rer. Jud. 284, ca. 16; Gore v. Perdue, Cro. Eliz. 308.

(k) Co. Litt. 35, a.

(l) Perk. sect. 397.

(m) Co. Litt. 35, a; Perk. sect. 394.

upon the widow, although the assignment itself be well made, according to common right; for the wrongful *manner* shall avoid the *matter* that is lawful.⁽ⁿ⁾ The assignment, where there has not been any covin in obtaining the freehold, must, however, in order to bind the heir, joint-tenant, or disseisee, be according to common right, as will presently be explained, otherwise the assignment will be voidable by the party injured, although it will be good until so avoided.^(o) The policy of the law in all this obviously ^[*281] is, to favour the claim of dower, and expedite the widow's course for obtaining the benefit of this, perhaps, the only means for her support, by upholding the assignment to her of that to which she is entitled, (and which could be enforced by process of law,) where it has been voluntarily given to her, although it may have been given by those who had not the entire, or even the true right to the freehold.

§ 2.—*Assignment of Dower according to Common Right.*

Assignment, when made by the tenant of the freehold, although he may not have the sole right to the freehold, nor even any right to it at all, being good, provided the matter assigned is according to common right, we shall now consider what it is that the widow, according to common right, is entitled to have assigned to her. The right of the widow is, to have assigned to her a third part of the property of her husband; but she is not entitled to have the assignment according to the actual nature of the property. Where, therefore, the property is lands, the sheriff may assign a third of the lands, or of a rent issuing out of them.^(p) But where the lands are assigned, the widow is entitled to have them distinguished by metes and bounds.^(q) It is not necessary, however, that the sheriff should assign to the widow a third part of each field; it will be sufficient if he assign a third part, according to the value of each parcel of land. If the husband were seised of thirty ^[*282] acres, ten arable, ten in pasture, and ten in meadow, and the writ ^{*}were to assign the third part of all lands and tenements, the sheriff might assign any of the ten acres as dower of the thirty.^(r) It is said,^(s) that if the husband were seised of three manors, the sheriff might assign one, or the half of it, as dower of the three. This is denied in Moore;^(t) but the difference between the two books may be reconciled by supposing that the assignment in this way would not be good, if the widow had recovered dower out of the three manors, and the writ were to assign accordingly;^(u) but that it would be good if the direction of the writ were general, as was held, where there were different kinds of land.^(v) It will be seen,

(n) Perk. sects. 395, 396; Co. Litt. 35, a.

(o) Perk. sect. 404.

(p) 1 Roll. Abr. 683, Z, 4; Co. Litt. 34, b. Roper, Vol. 1, p. 392, says, that if the heir or tenant assign a rent issuing out of lands dowerable, as for her dower, the assignment will be invalid; but this is not supported by the authorities he refers to, and is contradicted by those cited in the text.

(q) 1 Roll. Abr. 682, X, 1; Moore, 19, pl. 66; Booth v. Lambert, Sty. 276.

(r) Rowe v. Power, 2 B. & P., N. C., 34; 9 Vin. Abr. 257, pl. 13, note marg.; but see Moore, 12, pl. 47.

(s) 1 Roll. Abr. 693, X, 12.

(t) P. 19, pl. 66.

(u) 9 Vin. Abr. 257, pl. 13, note marg.

(v) Moore, 19, pl. 66.

when we come to speak of mines, that, in one case, the court held that the sheriff need not assign a third of each, but might assign so much of the whole as would amount in value to a third. The presumption therefore is, that the Court would sanction a similar assignment out of different parcels of land, not only from the obvious convenience of this mode, but by analogy to what the Court has, for the same reason, sanctioned in practice, as to setting out lands under *elegit*(*w*) and *partition*.(*x*)

The sheriff may not assign the dower with a precision and particularity amounting to absurdity, and productive of inconvenience and hardship to the party. Thus, if, in assigning dower of a house, instead of setting off equal to a third part of it, he set off a third of each chamber, the Court will set aside the assignment, and perhaps punish the sheriff.(*y*)

If the sheriff have, in fact, assigned the dower by metes *and bounds, and so state in his return of the writ, it will be sufficient if [**283*] he state generally the message or tenement from which he has assigned the dower, and by whom occupied, without going into further detail; for, in *Howard v. Cavendish*,(*z*) the Court overruled an objection to a return of this kind, that it was too general, observing that such precise certainty as in declarations and indictments was not required; that "a message or tenement in tenure of," &c., was good and usual. Where the property is not of such a nature as admits of the dower being assigned according to metes and bounds, the endowment is to be after a special manner.(*a*) Thus, if the husband were alienee from one of two joint tenants,(*b*) or were one of two tenants in common or coparceners, between whom there had not been any partition, dower could not, in any of these cases, be held in severalty, but must be held in common with the husband's heir and the other tenant or coparcener; for the heir of the husband can hold only in common. There could not, therefore, be any assignment by metes and bounds.(*c*)

Where the property consists of a house, the assignment should be, not of a third part, but of as many rooms as are equal in value to a third.(*d*) Of a mill, the endowment may be either of the third toll-dish or of the whole mill every third month,(*e*) and the widow may also grind at the mill toll free.(*f*) In *Gilpin v. Cookson*,(*g*) judgment to recover dower of the third part of a mill was reversed as erroneous; but the assignment of the third part of the profits is a freehold in the widow.(*h*) Of an advowson, dower should be assigned of every third presentation, and the same should be *where there are several advowsons;(i) nevertheless, in *Howard v. Cavendish*,(*k*) assignment of the third part of an advowson was sus- [**284*] tained as good. As to franchises, if appendant to *an honor*, dower may be assigned of a third part of them, as of the goods and chattels of felons;(l)

(*w*) *Den v. Abingdon*, Doug. 475.

(*z*) *Clarendon v. Hornby*, 1 P. Wms. 447.

(*y*) *Howard v. Cavendish*, Palm. 264.

(*x*) Cro. Jac. 621.

(*a*) Co. Litt. 32, a.

(*b*) Litt. sect. 44.

(*c*) Litt. sect. 45; *Glefold v. Carr*, Brownl. 127; *Fitz. Nat. Brev.* 149.

(*d*) *Abingdon's case*, referred to in *Howard v. Candish*, Palm. 265.

(*e*) Co. Litt. 32, a.; 11 Co. Rep. 25; Benl. & Dal. 120.

(*f*) Perk. sect. 415.

(*g*) 1 Lev. 182.

(*h*) *Fitz. Nat. Brev.* 149, K.

(*i*) Co. Litt. 32, b., n. 2.

(*k*) Cro. Jac. 621; see also *Fitz. Nat. Brev.* 149, G.

(*l*) *Howard v. Cavendish*, Cro. Jac. 622.

although Brooke, *(m)* on the authority of 3 Edw. 3, and for a reason equally applicable to both, says, that, if they are appendant to a *manor*, dower of them cannot be assigned, unless the assignment be of the whole manor, because franchises are not divisible.

In regard to tithes, a question was raised in *Thyn v. Thyn*, *(n)* whether the tithes out of which dower was claimed were set out with sufficient precision in the writ, but, although repeatedly argued, the question was never decided; *(o)* however, by analogy to what was required in a declaration in ejectment in *Harpur's case*, *(p)* which was referred to in *Thyn v. Thyn*, it would appear, that the particular kinds of tithe out of which dower is claimed ought to be set out in the writ. The assignment by the sheriff, under the writ, should be of the third sheaf of corn, as it is uncertain what land may be sown; *(q)* but, in *Kettle's case*, *(r)* an assignment of the tithes of the third yard land was held to be good. So, also, was an assignment of the third of the tenth part of wool, and the thirtieth lamb or third of every tenth lamb. *(s)*

Should there be open mines in the lands of the husband, which, as has been seen *supra*, p. 230, are subject to dower, they are so far held to be part of the lands, that it is not necessary that the sheriff should assign any [*285] part of them *for dower; he may assign such a part of the land, excluding the mines, as will amount to a third of the value of the whole including the mines, or he may include some part of the mines in the third, describing them specifically, if they should not lie within the portion of the lands assigned; if the mines assigned should lie within that portion of the land, then the sheriff need not describe them, as they will be included in the land. If the mines should be in lands which were not the property of the husband, as, from their nature, dower of them could not be assigned according to metes and bounds, the sheriff must assign them in a special manner, so as to give least inconvenience to the parties, and the Court thought he might do so by directing separate alternate enjoyment for limited periods, or by giving the widow a proportion of the profits. *(t)*

Where the property of the husband of which dower is claimed consists of the profits of stallage, of a fair, of keeping a park, of a dove-cote, or a public office, the assignment should be of a third part of the profits of each. If the property be a fishery, the assignment should be either of a third of the profits or of every third cast of the nets. *(u)*

§ 3.—*Assignment of Dower against Common Right.*

Such is the nature of the assignment of dower, which ought to be made by the sheriff, where the widow has recourse to legal process in order to enforce her legal right; and such ought to be the assignment made by the heir or other tenant of the property, where it is intended to give the widow what she is

(m) Abr., Dower, p. 262, pl. 102.

(o) Ibid. 143.

(q) Co. Litt. 32, a.; 11 Co. Rep. 25.

(s) Anon., Brownl. 126.

(u) Co. Litt. 32, a.

(n) Styles, 77.

(p) 11 Co. Rep. 256.

(r) Ibid., n. (3).

(t) Stoughton v. Leigh, 1 Taunt. 412.

entitled to of common right, without putting her to enforce it by legal remedy. But the widow may waive her legal right, and agree to take something short of that to which she is entitled. Thus, *if she agree to take a fourth, a fifth, or other smaller part as dower of her husband's property, an assignment of this will be good, subject to the observations to be afterwards made.(v) Or she may agree with the heir to take her third without having it distinguished by metes and bounds;(w) and this will be a good assignment, although the lands may have been demised for years by her husband, and be in possession of the tenant for years, who also will be bound;(x) and the assignment in such case will be good, notwithstanding the heir, who made it, be only a tenant in tail, having an estate which may expire before the life of the widow; for, as was said in *Rowe v. Power*,(y) as long as the tenant's estate and that of the dowress last, there is no reason why they should not between themselves agree to waive an assignment by metes and bounds, and make a good assignment of an undivided third part. Thus, if the widow accept an assignment of twenty acres of wheat,(z) or a money rent issuing out of the land subject to the dower, in lieu of her dower,(a) in either case the assignment will be good; and so will it be if the assignment were made during the period between judgment to recover dower and execution upon it. In such case, the widow's agreement to accept the rent would be a good bar to a scire facias,(b) and the assignment would be good, although it were made by parol.(c)

An assignment will be contrary to common right, and will not be binding upon the widow, though assented to by her, if it is not absolute and unconditional.(d) Thus, an assignment of a third of the lands subject to dower, excepting *the trees growing upon the land, was found to be void.(e) So, also, if the estate assigned is not of equal extent and endurance to the dower, the assignment will be no bar to the dower. Thus, assignment of a rent for years, or for the life of another, would not bind the widow, because neither gives her such an estate as by law she is entitled to in her dower.(f) In *Wentworth v. Wentworth*,(g) although the judgment in that case went upon a point of pleading, the doctrine as to the invalidity of any condition annexed to the assignment of dower was admitted by the Court. A condition, however, *in favour* of the widow, annexed to an estate assigned to her instead of dower, will be good. Thus, in *Wentworth v. Wentworth*,(h) the tenant of the land had given the widow a rent out of the land, in compensation of her dower, on condition that it should cease if unpaid for a month. The rent having been unpaid beyond this time, the widow sued for her dower, when the tenant pleaded that she was barred by

(v) Perk. sect. 405.

(w) *Booth v. Lambert*, Sty. 277.

(x) Roll. Abr. 682, X. 3.

(y) 2 B. & P. N. C., 33; *Bickley v. Bickley*, Anders. 287.

(z) Moore, 59, pl. 167.

(a) *Turney v. Sturges*, Dy. 91, b.; *Bickley v. Bickley*, Anders. 287.

(b) Perk. sect. 410; *Hanyer v. Foy*, Cro. Eliz. 310.

(c) *Turney v. Sturges*, Dy. 91, b.; *Colt v. Coventry*, Hob. 153; Perk. sect. 410.

(d) Co. Litt. 34, b.; 1 Roll. Abr. 682, X. 7.

(e) *Bullock v. Finch*, 1 Roll. Abr. 682, X. 8.

(f) *Bickley v. Bickley*, Anders. 287; *Colt v. Coventry*, Hob. 153.

(g) Cro. Eliz. 452.

(h) Ibid.

acceptance of the rent, and that the condition, as annexed to an assignment of dower, was void; but the Court held that the rent should have been paid without demand; and, as the condition was penal to the heir, the rent was void, because of the non-payment, and the widow should be restored to her dower.

Roper(*i*) says, that mere consent to assignment against common right is not sufficient to bind the widow, but that there must have also been *entry*; and for this he refers to two authorities. (*k*) It is, no doubt, true, that, in the case in Moore, the fact was, that the widow had entered; but the judgment was not rested upon that, further than as confirmatory of the fact of [*288] an agreement; and as to the case in *Leonard, the necessity for the introduction of the words *quod intrando agreevit* was expressed with reference to a plea in bar of a writ of dower, founded upon a jointure made during coverture, which is altogether a different case. No other authority has been discovered to support the proposition, that, in order to bind the widow to an assignment against common right, there must have been not only her acceptance but her actual entry to the property assigned.

In order, however, to make an assignment of dower, contrary to common right, binding at law upon the widow, even where she has accepted it, certain things are necessary. If the assignment be by parol of lands, they must be of lands of which the widow was dowable, otherwise the assignment will not at law be a bar to the dower; (*l*) for an estate of freehold or inheritance cannot be barred by a collateral satisfaction, but only by release or confirmation, or by an act which is tantamount; (*m*) and, as the widow could only be tenant at will in the lands assigned, (for the assignment by parol could not give any larger estate in them,) this is no sufficient satisfaction for the estate of freehold to which she was entitled in the lands of which she was dowable. Yet, in Hale, MS. (*n*) it is said, that, "if the heir assign dower of lands of which the husband was seised, but of which the widow was not dowable, she is tenant in dower; and that if the widow be endowed, and afterwards exchange with the heir for other lands which were the inheritance of the husband, she shall be said to be tenant in dower of the lands taken in exchange, and her entry shall be said to be by the husband." If the assignment be by parol of a rent, the rent must be issuing out of the lands of which the widow is dowable; for, although a rent may be assigned by parol out of these lands, because the dower is of common [*289] *right, a rent out of lands to which this right does not attach, and which lies only in grant, can only be passed by deed; the assignment, therefore, by parol, of a rent out of lands of which the widow was not dowable, would not pass any estate in the rent to her, so as to form a satisfaction for the dower, or be any bar to it. (*o*)

§ 4.—*Remedy against Error or Failure in Assignment of Dower.*

If the sheriff, or the heir, or other tenant of the land, have assigned to

(*i*) Vol. 1, p. 400.

(*k*) Moore, 679, pl. 928; 3 Leon. 272.

(*l*) Co. Litt. 34, b.; Perk. sect. 407.

(*m*) Vernon's case, 4 Co. Rep. 1; Turney v. Sturges, Dy. 91, b.

(*n*) Co. Litt. 34, b., n. (9).

(*o*) Co. Litt. 34, b.; Perk. sect. 410.

the widow a greater portion of the property than she was entitled to as her dower, the nature of the relief which will be given against this depends upon whether the assignment was made by the sheriff, or the heir, or other tenant. If the assignment were made by the sheriff, and the error were in excess, giving more than a third, the heir or tenant may sue out a writ of scire facias for a new assignment; (p) or, if the error were in assigning lands which were not in the judgment, the execution by the sheriff as to this is actually void, and advantage may be taken of the nullity by ejectment, at the instance of the heir or tenant, upon whom, however, the burden will lie to shew that the lands in question were not in the judgment. (q) In *Hoby v. Hoby*, (r) and in *Sneyd v. Sneyd*, (s) the Court of Chancery entertained its jurisdiction, in a suit by the heir, to set aside an assignment of dower by the sheriff; in the one case, because a coal-mine had not been taken into account in estimating the third given to the widow, and, in the other, because lands which were not subject to dower had been assigned; but, in a note to *Roper*, (t) it is said, that, in **Stratford v. Twynam*, an unreported case, the Master of the Rolls questioned the jurisdiction [*290] of a court of equity to entertain a suit of this nature, and suggested that the proper remedy was by application to the court of law, from which the process issued, to correct the error in the execution of it.

If the assignment were made by the heir extrajudicially, his right to have it corrected for error or excess will depend upon whether he was of age at the time. If he were of age, he has no remedy against his own act. This was certified by the Court of Common Pleas to Chancery, in *Stoughton v. Leigh*, (u) where the complaint was, that the assignment, which had been made by the heir, was excessive as to value. (v)

If, on the other hand, the assignment were made by the heir while under age, he may have the error corrected; but as the assignment is good except for the excess, which cannot be ascertained until it is done by measurement, the heir cannot treat the assignment as a nullity, and enter to the lands upon coming of age; (w) his remedy is by a writ of admeasurement, (x) which, according to *Fitzherbert*, (y) (not positively contradicted by *Coke*, though left in doubt by him,) (z) the heir may have, during his non-age, (a) or by application to a court of equity, which would probably give him relief in a suit properly framed.

If the widow, after having her third of the lands assigned as dower, should greatly improve the third beyond its value at the time of the assignment, this improvement will not form any ground for re-admeasurement at the suit of the heir; (b) but it is said by *Fitzherbert*, in the same place, that, *if the improvement be by casualty (by which he seems to mean [*291] "discovery") of a mine of coals or of lead, which had been occupied in the husband's time, it is a matter of doubt whether the heir shall

(p) *Howard v. Candish*, Palm. 266; Bro. Abr., Dower, p. 262, pl. 63; Gilb., Dower, 389.

(q) *Booth v. Lindsay*, Raym. 1293.

(r) 1 Vern. 218.

(s) 1 Atk. 441.

(t) 1 Roper, 406.

(u) 1 Taunt. 412.

(v) See also Gilb., Dower, 380.

(w) Gilb., Dower, 388.

(x) Co. Litt. 39, a.; *Stoughton v. Leigh*, 1 Taunt. 412.

(y) Nat. Brev. 149, B.

(z) Co. Litt. ubi supra.

(a) For the form of this writ, see Gilb. on Dower, 379; Fitz. Nat. Brev. 148.

(b) Fitz. Nat. Brev. 149, C.

have the writ of admeasurement; but inasmuch as, in *Stoughton v. Leigh*, it was held,^(c) that the sheriff must estimate the value of open mines in setting out the widow's part, it seems that there is no reason, now at least, for the doubt entertained by Fitzherbert; and that if the sheriff had overlooked an open mine, the heir would be entitled to the writ of admeasurement.

In executing the writ of admeasurement, the duty of the sheriff is to restore to the heir the surplus, which had been assigned to the widow, over what she was entitled to by law, but it is not competent to him under this writ to make any new assignment; that, if necessary to be done, must be accomplished by another proceeding.^(d)

Should the widow be evicted from the land assigned to her, by a party having a better title than her husband had, but which did not affect the two-thirds which remained after her assignment, she will be entitled to a new assignment out of these two-thirds,^(e) for the original assignment is with an implied warranty to this effect.^(f) Thus, if the husband were seised of three acres, two lawfully, and one by disseisin, and the sheriff had assigned the latter to the widow as her dower, if the disseisee should recover this acre from her, she would be entitled to an assignment de novo, not of one acre out of the other two acres, but of one-third of these two acres,^(g) for two acres were all the land which was lawfully subject to dower.

[*292] *§ 5.—*Effect of Assignment of Dower upon the Rights of the Widow and of Third Parties.*

In intendment of law, the widow, as to her dower, is in by her husband; but the vesting of the estate is suspended until assignment. The effect of assignment, followed by the widow's entry, is to vest in her an estate of freehold in the land assigned; so that, in real actions to recover the lands out of which the assignment has been made, it is necessary to make her a co-defendant with the tenant of the other two-thirds. For the same reason, where a recovery was suffered in order to bar remainders, limited of the lands out of which the assignment had been made, the widow was held to be the proper tenant to the præcipe in regard to that part of the lands which was assigned to her.^(h)

The nature of the estate held by the widow after assignment and entry is such, that she is thenceforth capable of accepting a release of the reversion in fee expectant on the termination of her estate, so as, by merger, to vest in her the absolute inheritance of the lands.⁽ⁱ⁾

We have now pointed out what, according to common right, the widow is entitled to have assigned for her dower, and what not according to common right the sheriff, in execution of the writ of dower, or the heir upon agreement with her, may assign to her in compensation of her dower; but,

(c) *Stoughton v. Leigh*, 1 Taunt. 412.

(d) *Fitz. Nat. Brev.* 148, F.

(f) *Roll. Abr.* 684, C. 1; *Bustard's case*, 4 Co. Rep. 122.

(g) *Perk. sect.* 420.

(i) 1 *Roper*, 416.

(e) *Perk. sect.* 418.

(h) *Rowe v. Power*, 2 B. & P., N. C., 1.

before quitting the subject, it will be necessary to consider the effect of each of these modes, where the rights of third parties come into question. When any charge or incumbrance upon, or dealing with the property, has been effected by the husband *prior* to the coverture, it will of course override the rights of the wife as to her dower, as these obligations are prior in date to the title of the *widow. This was the law at all times, even prior to the Dower Act; and so need not be further considered. [*293] Where dealings have been had by the husband with the property *during* the coverture, a distinction must be observed as to whether the widow was married prior to 1st January, 1834, from which date the Dower Act, 3 & 4 Will. 4, c. 105, has operation. In regard to widows married after that date, the 5th section of the statute declares, that "all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower."

On the other hand, the rights of widows married prior to or on the 1st January, 1834, so far as regards incumbrances over the lands subject to their dower, created by their husbands during the coverture, remain unaffected by the statute, and shall now be considered. After the right of dower has once attached, it is not in the power of the husband of a woman who was married prior to 1st January, 1834, to defeat the enjoyment of the right; for, as was before observed, a seisin once in the husband during the coverture will support a right to dower, although it may have passed from the husband in his lifetime; but in order to the enjoyment of the dower, unaffected by the acts of the husband during the coverture, it is necessary that the property to be enjoyed as dower should have been assigned judicially; or, if the assignment have been extrajudicial, that it should have been made according to common right; for the paramount title of the wife applies only to that part of her husband's estate which the law, or the officers of the law in the execution of the law, have given her for her enjoyment. This subject, however, requires to be considered at a little further length. If the assignment has been extrajudicial, and made according to common right, (as, where the *husband had three manors, and one-third of each manor has been assigned,) the widow, if married prior to 1st Janu- [*294] ary, 1834, will enjoy the property assigned, free from any act of the husband during the coverture, calculated to disturb her enjoyment. Thus, the alienation of the husband(k) will not create any title as against the dowress; so any lease granted by the husband will be void as against her,(l) should it be to her interest to disregard it, as giving too favourable terms to the lessee. And any recognisance or statute granted by the husband would be postponed to the dowress's right, so as not to take effect until the termination of her estate;(m) and the lands in the hands of the widow would not be liable to distraint for the debt of the husband contracted even to the Crown.(n)

(k) Co. Litt. 32, a; Fitz. Nat. Brev. 147, E; Benson v. Scott, 3 Lev. 386.

(l) Stoughton v. Leish, 1 Taunt. 410; Co. Litt. 46, a; Earl of Bedford's case, 7 Co. Rep. 72.

(m) Fulwood's case, 4 Co. Rep. 64.

(n) Co. Litt. 31, a; Fitz. Nat. Brev. 150, Q; Gilb., Dower, 407, 411.

Rolle(o) says, that the dowress will not hold subject to the charges of the husband, if the assignment has been made by the sheriff in execution of a writer of dower, although he may have departed from common right in the mode in which he has set out the property to be enjoyed. And Perkins says,(p) that, if the husband were seised of three manors, and had in his lifetime granted a rent-charge payable out of all three, and the sheriff were to set out one as the dower of the three, instead of setting out a third of each, the widow would, in such case, be entitled to enjoy the manor which had been assigned to her discharged of the rent-charge. From these passages, it has been supposed, that the paramount title of the dowress will prevail, although the assignment may have been contrary to common right, provided it have been made ministerially by the officer of the law.

[*295] *But Perkins, in the next section,(q) doubts this in the case of advowsons. There, he says, if the husband were seised of the advowson of three several churches, and granted during the coverture the first avoidance of the three to a stranger—if the sheriff should assign the advowson of one of the churches as dower of the three, and this church should be the first void, the grantee, and not the widow, would have the presentation; notwithstanding the sheriff had made the assignment; because, he says, she was endowed against common right, and this shall not prejudice the grantee, who was a stranger to the assignment, and could not otherwise take advantage of his grant. These reasons, it will be obvious, are equally applicable to the case of the three manors; but the author, in the next section,(r) gives, as a reason why the law is different in the two instances, that, in the case of the manors, the grantee might distrain for the whole rent in the other two, and this would not be more prejudicial to the heir. But it is possible to suppose, that the rent was issuing only out of two of the three manors, that assigned being one of the two. In such a case, the grantee would be prejudiced, if the other manor should not be sufficient to answer the rent; for, by this mode of assignment, he has but one manor to answer his rent; whereas, if the assignment had been according to common right, i. e. one-third of each of the three manors, the grantee would have had two-thirds of the two manors, with which his rent was charged, in order to answer it. It would seem, therefore, that, where the assignment has been made against common right by the sheriff, the right of the widow to enjoy the property assigned, discharged of incumbrances, will, in some degree at least, depend upon how far her doing so will or will not be attended with prejudice to the incumbrancer.

[*296] *Where, however, the assignment has been against common right, under an agreement with the heir, there the widow will hold, subject to the charges created by the husband.(s) Thus, if the husband were seised of three manors of equal value, and had granted a rent-charge issuing out of the three, and the widow should accept from the heir one of the three as her dower of the whole, two-thirds of the manor assigned to her would remain charged with the rent;(t) nay, more: if one only of the three should be charged with the rent, and the widow should accept this one as her dower, she would be obliged to hold it so charged;(u) and yet Rolle(v)

(o) Roll. Abr. 684, D. 4.

(r) Sect. 332.

(u) Co. Litt. 173, a.

(p) Sect. 330.

(s) Roll. Abr. 684, D. 3.

(v) 685, D., 5.

(q) Sect. 331.

(t) Perk. sect. 330.

says, that, if the husband were seised of four manors, and the widow were endowed, by the heir, of one in place of the whole, she would hold it discharged. It would seem, therefore, that the law will support even an extrajudicial assignment against common right, where doing so will not, as is obvious in the case which has been put, work inconvenience to third parties. It is only in this way that what Rolle says, in the two passages just cited, can be reconciled; for, in both, the assignment is supposed to have been against common right.

*CHAPTER VIII.

[*297]

POWERS AND RIGHTS OF DOWRESS.

ASSUMING the widow to have been by assignment put into possession of her estate of dower, we shall now consider the powers she enjoys, and the rights to which she is entitled in her character of dowress.

§ 1.—*Powers of Dowress.*

First, as to her powers:—She may grant any estate out of the property of which she is endowed, which, either from the terms of the instrument, or the effect which the law gives to these terms, though in themselves of larger import, shall not have a longer endurance than her own life. Thus, she may grant leases for years, but they will be good only while her own life lasts, unless, indeed, to sustain action by her executors for such rent as may have been in arrear at her death.(a) But if the instrument, either by its terms or by the effect given to it in law, conveys an estate which will endure beyond her own life, she will thereby create a forfeiture of her own estate. Whereas, if she alien in fee, by an instrument capable of having that effect, or grant a lease for the life of the lessee, with livery of seisin, she will thereby incur a forfeiture;(b) and by 6 Edw. 1, c. 7, and 11 Hen. 7, c. 20, the alienation will be void, and the person who would be entitled to take upon her death may then enter and enjoy the lands. If the instrument by which she professes to grant a fee simple have not that effect in law, no forfeiture will be incurred.(c) Thus, if the instrument used [*298] be a lease and a release, or bargain and sale, no forfeiture will ensue, because these do not in law convey a larger estate than is in the grantor at the time;(d) or, if she make a feoffment without livery of seisin, whereby no estate would pass, a forfeiture will not be incurred.(e)

If a lease have been granted by the husband, under a proviso, that, if

(a) Bro. Abr., Leases, pl. 19.

(c) Co. Litt. 59, a., and 251, b.

(b) Co. Litt. 252, a.

(d) Gilb. Ten. 255.

(e) Co. Litt. 59, a.

the tenant committed waste, the lease should ipso facto become void, the dowress may enter for the condition broken.^(f) Whether, if the lease contained a condition for re-entry, the dowress could take the benefit of the condition, has not been the subject of judicial decision. In Coke Litt.,^(g) after stating that assignees from the lessor may, under the terms of 34 Hen. 8, c. 34, (altering the common law as stated by Littleton),^(h) take the benefit of such a condition, it is said, that such as "come in merely by act in law" have not the benefit of this statute. Roper,⁽ⁱ⁾ relying upon this passage, is of opinion that a dowress could not take the benefit of the condition, "because her estate is the creature of law:" no doubt it is so; but Coke's observation is not in regard to those who have estates the creatures of law, but in regard to those who come in by act of law; it is of these last he makes the observation, that they have not the benefit of the statute, and the instance he gives are of "the lord of the villain, the lord by escheat, the lord that entereth or claimeth for mortmain, or the like." All of these not only come in by act of law but by title paramount to that of the lessor, [299] whereas the dowress, as has been already shewn, comes in by her *husband, the lessor; so that this passage in Coke will not, as it seems, include her under the words "or the like;" and, as the dowress is plainly within the reason of the statute of Hen. 8, and the Courts seem disposed to put a liberal interpretation upon the statute, probably, if the question were to arise, she would be found entitled to its benefit; for, in *Isherwood v. Oldknow*,^(k) the Court of King's Bench held, that, where a lease had been granted by a tenant for life, in execution of a power, the lease was to be considered as having been made by the grantor of the power, and that, in this way, the tenant in remainder was the grantee of the lessor, and entitled, under the statute, to take the benefit of a condition in the lease for re-entry. If the dowress have her estate, as part of the estate of the husband the lessor, as she indeed has, she seems to be plainly within the terms as well as the intendment of the statute, if, indeed, she requires its aid at all, for her estate is an excrescence from, or continuance of, the estate of her husband.^(l) In this view she would seem to be entitled to the benefit of the condition, according to the common law prior to the statute.

In Co. Litt.^(m) "the profits of courts" are enumerated as amongst the things not divisible by metes and bounds, and as one of the things, therefore, of which the widow should be endowed in a third part, leaving the inference that she ought not to be endowed of copyhold lands as widow of the lord. However, if she be so endowed, and of this there are many instances in the books, she may, as lord pro tempore, accept surrenders from the tenants, and make re-grants, so as to bind the lord who has the reversion after her estate is ended;⁽ⁿ⁾ and she may do so even where the re-grant is in reversion, so as it may take effect after her *death, if the custom warrant [300] such a grant.^(o) In order to enjoy this power, it is not necessary that the whole manor have been assigned for dower. Assignment of a part

(f) Gamock and Cliff's case, 1 Leon. 60, 61.

(g) Co. Litt. 215, b.

(h) Sect. 347.

(i) Vol. 1, p. 425.

(k) 3 M. & S. 402.

(l) Co. Litt. 241; 9 Vin. Abr. 373, pl. 82.

(m) 32, a.

(n) Brown's case, 4 Co. Rep. 23.

(o) Gay v. Kay, Cro. Eliz. 661.

of a manor will authorise the dowress to hold courts for the re-grant of the lands lying within the assignment.(p)

§ 2.—*As to the Rights of the Dowress.*

Dower being an excrescence from or continuance of the estate of the husband, the dowress is entitled to botes or to the benefit of the wood growing upon the land, for all reasonable or domestic or agricultural purposes, and to the interest upon the price of any wood cut down by the heir prior to her assignment of dower;(g) and she has at all times been entitled to the crops of seed sown by her husband, and growing at his death in the lands assigned to her.(r) In this respect she enjoys a privilege over all other tenants for life, who are not put into possession until the crops in the ground at the time of their entering are reaped; while at the same time she may, by the express terms of the Statute of Merton(s), bequeath the crops sown by herself and growing on the land at the time of her death. As this right to dispose of the crops sown by herself is one which every holder of land upon an uncertain estate enjoys,(t) it is not obvious what gave rise to the passing of this statute. Parker(u) says, that at common law tenant in dower could not bequeath the corn she had sown, and that it became the property of the person having the reversion; and Roper(v) says *that the Statute of Merton was rendered necessary from a notion having [*301] grown up that a dowress had not a right to dispose of the corn she had sown, because, as has been seen, she has the crop sown by her husband before her estate of dower came into possession, and she was therefore not entitled to the crop to be reaped after that estate had ceased; but Perkins(w) says, that a tenant in dower may "devise the corn growing upon the land, which she holdeth in dower at the time of her death, by the common law;" and he refers for authority to a case in the 4th Henry,(x) sixteen years before the Statute of Merton was passed. Whatever, therefore, may have given rise to that statute, it would seem, that, prior to its date, tenants in dower, in common with other tenants for life, enjoyed this right of disposing at their death of the crops they had themselves sown, and that they now enjoy it, under the statute as well as the common law, which is all the difference that is made by the statute. Being thus tenants for life, dowresses are in the same situation with tenant for life generally, in questions as to what things are to come under the term "crop." The policy of the common law is, that the holder of land for an uncertain period should be induced to bestow upon it the best cultivation, by an assurance that he will, at all events, be entitled to reap the crops he has sown.(y) This is equally

(p) Bragg's case, Godb. 135; Gould. 37; Owen, 4.

(q) Bishop v. Bishop, 5 Jur. 931.

(r) Fisher v. Forbes, 2 Eq. Ca. Ab. 392; Dyer, 316 a; 1 Roll. Abr. 727, A. 19.

(s) 20 Hen. 3, c. 2.

(t) Co. Litt. 55, b.

(u) Dower, p. 355.

(v) Vol. 1, p. 426.

(w) Sect. 522.

(x) 4 Hen. 3, Devise, 6.

(y) Co. Litt. 55, b.

applicable to a dowress as to any other tenant for life; and as other tenants for life are entitled to reap crops, not merely from the seed actually sown by themselves, but likewise from ancient roots which yield an annual profit,^(z) and upon which labour and industry, in order to produce and gain the crop, are required,^(a) it would seem that a dowress is entitled to the like under the reason and principle *of the common law, aided by the [*302] Statute of Merton, though there does not seem to be any positive authority for this (except Roper's) applicable to the case of tenant in dower.

If the dowress should not bequeath or otherwise dispose of the growing crop, it will go to her executor. Thus, if she be dowress, as the widow of one of two tenants in common, and she and the surviving tenant sow the lands, and she die before the crop is reaped, the crop will belong to her executor, in common with the other tenant.^(b) But like other tenants for life who lose their right to the crops sown by them, if their estate is put an end to by their own act, as by forfeiture or breach of condition,^(c) a dowress is subject to the same consequence; thus, if the widow of a copyholder, holding land *durante viduitate*, marry again, she will lose her right to the crops growing at the time of her losing the lands by her marriage, because the determination of her estate was by her own act.^(d) This is the reason given in the books, and yet it seems unsatisfactory; for the policy is, that the land shall be well cultivated, and this object would seem to make it as necessary that the dowress should have the growing crops, where the uncertainty of her estate depends upon her own voluntary act, as where it depends upon events over which she has no control. If apprehension of being induced to do the voluntary act restrains her from cultivating the land, the policy of the law is equally defeated as in the other case; at the same time, no doubt, there is an obvious difference between apprehension of the consequences of our own voluntary act, and one over which we have no control.

[*303]

*CHAPTER IX.

LIABILITIES OF THE DOWRESS.

As the widow is in by the husband, and her estate of dower is a continuance of his seisin, she stands in his place, as regards the lands held by her, for performance of the duties and services to which he was subject as tenant of the land. Thus, while the feudal tenures were in full operation, the dowress was attendant to the lord for the services due to him,^(aa) in the rate and proportion that the land held by her bore to the whole land which had been held by the husband.^(bb) For the same reason, she is liable to bear a

(z) *Ibid.*; 1 Roll. Abr. 728, A. 22.

(a) *Latham v. Atwood*, Cro. Car. 515; *Keilw.* 125.

(b) *Perk.* Sect. 523.

(c) *Co. Litt.* 55, b.

(d) *Co. Litt.* *Ibid.*; *Oland's case*, 5 Co. Rep. 116.

(aa) *Co. Litt.* 241.

(bb) *Perk.* 434.

proportion of the rents or charges upon the lands of the husband, corresponding to the proportion held by her; so that, if the land had been granted to the husband with a rent reserved, the dowress would be liable to the donor in one-third of the rent.(c)

If the rent is divisible the dowress is liable to payment of one-third, as where it is a money payment; if it is indivisible, then she is liable to every third payment, as where the rent is the delivery of a horse annually; and so as to other things.(d) If the lands were subject to a mortgage made before the coverture, the dowress is liable to pay one-third of the interest upon the mortgage debt,(e) if she were married prior to 1st of January, 1834. If she were married subsequent to that date, her right would, under the *Dower Act,(f) be postponed altogether to the mortgage, as [*304] has been shewn.(g)

Like other tenants for life, a dowress is liable for waste, committed either by her or by another deriving right from her, as her assignee.(h) If the heir still have the reversion, he is the party to sue; if he, as well as the dowress, have parted with his interests, then his alienee may sue the assignee of the dowress.(i)

Whether a dowress is liable for waste permitted by her has been doubted. A suggestion in one of Hargreave's notes to Co. Litt.,(k) whether tenant in dower was liable only for active and not for permissive waste, gave rise to a discussion in Roper,(l) to shew that she is liable for both; and of this there seems so little room for doubt, as hardly to justify the uncertain state in which that author leaves the question. Previous to the Statute of Gloucester,(m) a prohibition of waste lay against a tenant in dower or by curtesy, while it did not lie against tenant for life, or years, or at will, by agreement of party. The distinction in the two cases arose from this, that in the latter the tenant comes in by the act of the lessor, who might stipulate beforehand that no waste should be done; whereas, in the former, the tenant comes in by act in law, and without the power of him in the reversion to make any such stipulation.(n) In the books, where this is laid down, no distinction is made between active and permissive waste. Then came the Statute of Marlbridge,(o) which forbade "fermors to make waste during their terms," followed by the Statute of Gloucester, which gave a writ of waste against tenant for life or years, as well as tenant in dower; *still without [*305] making any distinction between the two kinds of waste, and omitting mention of tenants-at-will. Littleton(p) says, that tenant-at-will is not bound to "sustain or repair the house, as *tenant for term* of years is tyed;" and in Co. Litt.,(q) where the liabilities of tenant by the curtesy, in dower, and for life or for years, are treated of, instances are given of permissive waste. Coke, therefore, puts all these tenants in the same category; and Rolle(r) says, that an action would lie against "lessee" for permissive waste. As, therefore, the tenant in dower has always been liable at common law

(c) Ibid. 431; Co. Litt., ubi supra.

(e) Squire v. Compton, 2 Eq. Ca. Ab. 387.

(f) 3 & 4 Will. 4, c. 105.

(h) Co. Litt. 54, a.

(k) 57, a. (1).

(m) 6 Edw. 1, c. 5.

(o) 52 Hen. 3, c. 23.

(q) 53, a.

(d) Perk. sect. 431.

(g) Ante, p. 249.

(i) Ibid.

(l) Vol. 1, p. 421.

(n) Co. Litt. 54, b.

(p) Sect. 71.

(r) 816, pl. 36, 37.

for permissive waste, even while tenants for life or for years were not liable, until the Statute of Gloucester made them so; and as these tenants unquestionably are liable under that statute for permissive waste, there seems no reason to doubt that the situation of the tenant in dower is not better in this respect than that of these tenants; more especially as there is the same principle why she should be liable for permissive as for active waste. Since the heir cannot enter upon her to make repairs, he may suffer as much damage by her permissive as he would by her active waste.

With regard to waste by accidental fire, that is regulated by 6 Anne, c. 31, which declares that no action shall be maintained against "any person" in whose house a fire shall accidentally begin. If this statute is sufficient to protect tenants for years or for life against this liability, which otherwise would lie upon them under the Statute of Gloucester, there seems no question that it will equally protect the tenant in dower, upon whom the same liability lies, as well at common law as under the statute. "Any person" seem comprehensive enough to embrace her along with others.



[*306]

*CHAPTER X.

PROCEEDINGS FOR RECOVERY OF DOWER AT LAW AND IN EQUITY.

HAVING considered the nature of the estate of dower, what is necessary in order to give a title to it, and the property upon which the right attaches, the subject to be next considered are the means open to the dowress for the assertion of the right, when she is compelled to resort to legal proceedings for that purpose. After the different modes of recovery of dower have been disposed of, there will still remain to be considered what it is she is entitled to recover if put to adopt proceedings. Where the *right* to dower is admitted, the jurisdiction of the Courts of law and of equity for recovery of the dower is concurrent, and proceedings may be adopted in either, at the option of the dowress. The question of *right* is all that the Courts of equity recognise as exclusively belonging to legal jurisdiction; where that is admitted, there is nothing for which they require the assistance of law.^(a) And as Courts of equity afford facilities for the recovery of dower, which cannot be obtained at law, equity is the jurisdiction generally preferred, as was said by Lord Erskine in *Mundy v. Mundy*.^(b) The course of procedure in equity, therefore, will first be shewn, and afterwards the procedure at law, of which, although it has fallen greatly into disuse, it is proper some knowledge should be preserved.

(a) *Curtis v. Curtis*, 2 Bro. C. C. 620; *Mundy v. Mundy*, 2 Ves. jun. 128.

(b) *Ubi supra*.

*§ 1.—*Proceedings in Equity for Recovery of Dower.* [*307]

Courts of equity not only give the widow every assistance in paving the way for establishing her right at law, by a discovery of the facts necessary to enable her to do so, but they also give her complete relief when the right is ascertained. (d) It is not a sufficient ground of demurrer, therefore, to a bill in equity, that the right has not been established at law; for, if that is the case, the Court will retain the bill, with liberty to the widow to bring her writ of dower. (e) Nay, it is not certain that the Court will even make it necessary for her to do that; for, in a note to Roper, (f) it is said, that, "in a recent instance," (the name of which is not given,) a case for a court of law was directed. Roper, however, seems to think it prudent that a charge should be inserted in the widow's bill, that there are obstacles to the establishment of her right at law which make it necessary for her to come into equity. In *Curtis v. Curtis*, (g) the obstacle alleged was detention by the heir of the husband's title-deeds, and ignorance in the widow of the husband's lands; and this charge seems to have been relied on by the Master of the Rolls in his judgment. In *Mundy v. Mundy*, (h) no such charge occurred, and a demurrer was put in for want of jurisdiction; but the defendant likewise put in an answer, in which he admitted the widow's right, and, upon that ground, the demurrer was overruled, Lord Loughborough observing, that the heir had not left any question to be tried at law.

The title of the widow being either admitted or ascertained at law, the Court will aid her in discovering the lands *of her husband out of which she is dowable; and, if there should be any outstanding terms, [*308] will remove them out of her way. (i)

It must be observed, however, in electing whether to proceed at law or in equity, that the Court of equity do not treat dower otherwise than as a legal claim; therefore it is prosecuted simply as such, and all the aid which can be asked of the Court is the discovery necessary for assertion of the right. The Court, accordingly, will not allow any defence to prevail which would not prevail at law; such, at least, seems to be the effect of the decision in *Williams v. Lambe*: (k) there the defence to the claim of dower was a plea of purchase from the husband during the coverture, without notice of the marriage; but Lord Thurlow said the plea was not applicable, "it being only a bar to an equitable, not to a legal claim." No doubt, in *Jerrard v. Saunders*, (l) (in which, however, *Williams v. Lambe* was not noticed,) Lord Loughborough repudiated what had been imputed to Lord Nottingham in *Rogers v. Searle*, (m) viz. that, if the plaintiff had a legal title, the defendant could not protect himself as a purchaser for valuable consideration, as impossible to have been Lord Nottingham's opinion; and said it had been decided, that, against a purchaser for valuable consideration, without notice, the

(d) *Curtis v. Curtis*, 2 Bro. C. C. 632.(e) *Ibid.* 620; *Mundy v. Mundy*, 2 Ves. jun. 128; *Darcy v. Blake*, 2 Sch. & Lef. 391.

(f) Vol. 1, p. 450, note (b).

(g) *Ubi supra.*

(h) 2 Ves. jun. 124.

(i) *Dormer v. Fortescue*, 3 Atk. 130.

(k) 3 Bro. C. C. 264.

(l) 2 Ves. jun. 457.

(m) *Freem.* 84.

Court would not take the least step imaginable. But in *Collins v. Archer*,⁽ⁿ⁾ where *Williams v. Lambe* was cited, although *Jerrard v. Saunders*, to be sure, was not noticed, Sir J. Leach, M. R., said, "Following the case of *Williams v. Lambe*, and the general principle of a Court of equity, he was of opinion that purchase for valuable consideration, without notice of a prior charge, was of no avail against a legal title."^(o)

[*309] *If, therefore, the dowress should by her bill ask to have the aid of the Court to deprive the defendant of any title which he could have used at law, as to set aside an outstanding term acquired by a purchaser for value without notice, the Court, adhering to the principle of dealing with her claim as a legal one, would not, it is apprehended, give its aid for such a purpose. Being asked to treat the claim in this respect as an equitable one, and the equities of the dowress and purchaser being equal, the Court would not interfere to deprive either party of any defence which would have been available at law.

It may be observed, that such is the favour shewn to a dowress, that, if the question of dower form only one question out of several in a suit instituted, the Court will expedite the proceedings in regard to the dower by directing a report (where one is required) to be made separate from the general report, in order that the dowress may as early as possible receive her dower as the fund for her maintenance.^(p)

§ 2.—*Proceedings at Law for Recovery of Dower.*

Where the Courts of law are resorted to by the dowress for recovery of her dower, and no part of it has previously been assigned by the tenant, her remedy is by writ of dower unde nihil habet, which is a writ directed to the sheriff, commanding him to see that the heir render to the widow her reasonable dower, of which she complains that she hath nothing, and that the heir unjustly deforceeth her; or, if part has been previously assigned by the tenant, her remedy is by writ of right of dower, which is a writ directed to the heir, commanding him to do full right to the widow of a third of her husband's lands, [*310] which she claims to *hold of him in dower.^(q) If the assignment have been made by some other person than the tenant, the writ unde nihil habet will lie.^(r) These writs lie against the freeholder in the land, who ought voluntarily to have assigned the dower, and cannot be brought against any one who has only a chattel interest; for one having such an interest alone cannot endow the widow of a freehold, which her dower is;^(s) and if the writ should be directed against him, and judgment and execution should be obtained, he might nevertheless enter upon the dowress.^(t)

The process and pleadings in the action founded upon these writs will be found in the books of practice, and do not, therefore, require to be stated

(n) 1 Russ. & My. 292.

(o) But see *Jogce v. De Moleyns*, 2 Jones & Lat. 374.

(p) *Eccleston v. Berkley*, Ca. temp. Hard. 253.

(q) 2 Inst. 262; Fitz. Nat. Brev. 8, C.

(s) *Bedingfield's case*, 9 Co. Rep. 17.

(t) *Michels & Hyde's case*, 1 Leon. 92.

(r) 3 Edw. 1, c. 49.

here. It may be observed, however, that, if the husband had aliened part of the lands, and left others in the same county, the action will be made to proceed against the heir of the husband in exoneration of the alienee.(u) If other land were not left by the husband in the same county, then the widow has judgment against the alienee, and he has it over in value against the heir.(v)

Where there are several alienees from the husband an assignment by one of them, in satisfaction of dower out of the whole lands, cannot be taken advantage of by the other alienees, because they are strangers to the assignment; but if the heir had other lands descended than those aliened, and out of them assigned dower in satisfaction for the whole, the alienees can take advantage of this assignment to plead it as a bar to the widow's action,(w) although the lands assigned should lie in another county *than those held by the alienee.(x) If there be several alienees, the widow can [*311] have dower from each alienee only of the land held by him.(y)

It is a good defence by the heir to the widow's action for dower, that she detains the title-deeds of the lands; for she is not worthy to demand dower of her husband's inheritance, who will wrongfully detain from his heir, by whom she is to be endowed, the muniments which might defend it.(z) But the plea is no bar to the action; for the heir, in his plea, must say that he always was, and still is, ready to assign dower,(a) which is a confession of the action; and, therefore, if the widow, in reply to the plea, admit her possession of the deeds, and offer to deliver them to the heir, she will be entitled to judgment at once.(b) But in such case, since the widow has herself delayed the assignment of her dower, Coke says,(c) "Some say she shall not recover damages." If the widow deny the plea, and the issue is found against her, then she forfeits her dower.(d) If the freehold be in the possession of a stranger, who has had the evidence conveyed to him, he cannot plead detention of charters to a writ of dower, for the plea lies only in privity;(e) neither, in such a case, could the heir, if he were vouched in the action by the stranger,(f) for he would not then be tenant of the freehold; and, consequently, could not, in his plea, state, as has been shewn it is necessary he should do, that he has always been and is ready to assign dower. But if the heir had other lands descended to him in the same county than those in the hands of the stranger, and he were vouched in the action by the stranger, then he *might plead detention; for, as he [*312] could, in or out of Court, endow the wife of the lands retained by him in respect of the whole descended to him, as well those retained as those aliened to the stranger, he could, in such case, say, that he was always and is ready to endow the widow.(g) Neither can the heir plead this defence, if the lands have come to him, not by descent, but by purchase;(h)

(u) Bedingfield's case, 9 Co. Rep. 18, 19; Co. Litt. 39, a., n. 6.

(v) 22 Vin. Abr. 79, pl. 5, 6; 80, pl. 7; 127, pl. 3; Bro. Abr., Dower, pl. 2; Id., Voucher, pl. 3.

(w) Co. Litt. 35, a.

(x) Perk. sect. 409; Jenk. 41; Carter, 187.

(y) Perk. sect. 423.

(z) Bedingfield's case, 9 Co. Rep. 18; Perk. sect. 356.

(a) Burdon v. Burdon, Salk. 252.

(b) Bedingfield's case, ubi supra.

(c) Co. Litt. 32, b.

(d) Hob. 199.

(e) Bedingfield's case, ubi supra; Stokes v. Amnesby, Cro. Eliz. 367; Perk. sect. 360.

(f) Bedingfield's case, ubi supra; Perk. sect. 358.

(g) Bedingfield's case, 9 Co. Rep. 18.

(h) Ibid; Perk. sect. 356.

nor if he have himself delivered the charters to the widow.(i) Moreover, the charters detained must relate to the land out of which the dower is claimed; so that the heir cannot plead detention of charters in respect of one parcel of land to a writ of dower for another parcel.(k)

It is not necessary, in order to make the plea available to the heir, that he should be solely entitled to the charters detained. The defence will be available to him, although the titles should concern the inheritance of another party: thus, if a writ of dower should be sued against one of two coparceners after partition made, the defendant might, nevertheless, plead this defence to the writ, although the charters concerned the inheritance of the other coparceners.(l)

It would, however, be a good answer, by the widow, to the plea of detention of the title-deeds, that she was enceinte of a child, who might be a nearer heir than he who pleaded the detention.(m) Thus, in the case just supposed, if the coparceners were daughters, it might be that the child in utero should prove to be a son.

[*313] *§ 3.—*Costs of Proceedings for Recovery of Dower.*

With regard to the costs of proceedings for recovery of dower, a distinction must be observed between proceedings at law and proceedings in equity. At law, on a writ of right of dower, no costs are given; but if the suit be by writ of dower unde nihil habet, in which the dowress, by the Statute of Merton,(n) is entitled to recover damages in lieu of dower for the time past, as will be afterwards shewn, she is also entitled to her costs of the action by the Statute of Gloucester,(o) which gives costs in all cases where the party is to recover damages. In equity, it is considered, that the Statute of Gloucester does not bind the Court; and that costs are, in the case of dower, as in every other case, in its own discretion. But, following the analogy of proceedings at law, the Courts of equity do not give costs where the suit is purely for the assignment of dower.(p) If, however, in such a suit, a question of title should be raised, and be vexatiously litigated, the Court would award costs to the dowress.(q) With regard, again, to a suit, not for assignment, but for recovery of dower, and in which the widow is entitled to an allowance for dower for time past, by reason of the heir having vexatiously kept her out of the dower, as such suit is, in this respect, analogous to proceedings at law under a writ unde nihil habet, the Court will likewise award costs to the dowress.(r)

(i) Bedingfield's case, ubi supra.

(j) Ibid. 359.

(n) 20 Hen. 3, c. 1.

(p) Lucas v. Calcraft, 1 Bro. C. C. 133.

(r) Worgan v. Ryder, 1 V. & B. 20.

(k) Perk. sect. 357.

(m) Ibid. 360; 1 Bro. Abr. 679, M. 1.

(o) 6 Edw. 1, c. 1.

(q) Ibid.

*CHAPTER XI.

[*314]

WHAT THE WIDOW SHALL RECOVER FOR TIME BYGONE IF PUT TO SUE FOR
HER DOWER.

ACCORDING to the common law, a widow was entitled to dower only from the time at which it was assigned; and, however long this might have been delayed, she had no means for recovering this provision for her maintenance for the period between the death of her husband and the assignment. This state of the law exposed her to great hardship and injustice, and was, in process of time, remedied by a special statute,^(a) known as the Statute of Merton; the effect of which was, that if a dowress were compelled to sue for her dower, she was entitled, if her husband died seised of the lands, to recover it, not merely from the date of the judgment or decree, as was the case prior to the statute, but from the time of her husband's death, "unto the day that the said widows, by judgment of our Court, have recovered seisin of their dower;" the dower for the period between the husband's death and the date of the judgment being given as damages for the detention.^(b) The time to which this claim of damage can draw back is now limited, by the 3 & 4 Will. 4, c. 27, to six years, as will be afterwards shewn.

This Statute of Merton, though silent as to copyholds, has been held to apply to them; and, therefore, where the widow, by the custom of the manor, is entitled to free-bench, she may recover, in the court of the manor or in *Chancery, the mesne profits of the copyhold lands from [*315] the death of her husband.^(c)

It must be observed, however, that, *at law*, in order to entitle the widow to the benefit of the statute, it is necessary that the husband should have died seised of the lands out of which the arrears of dower are claimed; for the words of the statute are, "whosoever deforce them of their dowers of the lands whereof their husbands *died seised*." Whether it is necessary *in equity* that the husband should have died seised, in order to entitle the dowress to the benefit of the statute, will be shewn afterwards.

If the tenant of the land sued out a writ of error of the judgment, it would seem, from the terms of the 16 & 17 Car. 2, c. 8, that the Courts, instead of construing the word "judgment," in the Statute of Merton, to mean the final judgment, limited its meaning to the first judgment complained of by the writ; and held themselves tied up from giving the mesne profits between the date of the judgment and the final affirmance of it in the court of error. To remedy this obvious difficulty, which the Courts had themselves created, the 16th and 17th of Charles gave them power to award the mesne profits accrued after the date of the first judgment, and declared that execution should not be stayed upon the writ of error, unless the plaintiff in error should be bound by recognizance, in case the judgment should

^(a) 20 Hen. 3, c. 1.^(b) *Dobson v. Dobson*, Ca. temp. Hardw. 19.^(c) *Shaw v. Thomson*, 4 Co. Rep. 30; Co. Litt. 33, a.

be affirmed, the writ be discontinued by default, or the plaintiff be nonsuited, to pay such costs or damages as should be awarded by the Court. If this recognizance be given and the judgment should afterwards be affirmed, the defendant in error may recover her costs by action upon the recognizance, and she may at the same time have a writ of inquiry to ascertain the mesne profits *or dower for the time past.(d) Whether, therefore, [316] the widow resorted to law or to equity for recovery of her dower, she was entitled under these statutes to have the dower from the time of the husband's death until the date of the judgment in law or decree in equity; but, as the mesne profits, between the date of the death and of the judgment or decree, are given by the Statute of Merton as *damages*, the consequences to the widow of the death of the tenant, in the course of the proceedings for recovery of the dower, are different, according as she may have resorted to law or to equity. Sayer, in his *Law of Damages*,(e) says, "If a widow have dower assigned *in consequence of a decree of a Court of equity*, she is not entitled to damages, because damages are only given by the Statute of Merton where a widow cannot have her dower without plea." This he says upon the authority of Co. Litt.(f) where it is laid down, that "If the wife hath dower assigned to her in Chancery, she shall have no damages, for the words of the statute be, 'et viduæ per placitum recuperaverint.'" But Lord Alvanley, in *Curtis v. Curtis*,(g) says, this is "certainly a mistake of the meaning of Coke, who is there speaking of the writ de dote assignanda issued by the Court of Chancery, and not a decree of a Court of equity." In Fitzherbert's *Natura Brevium*, the nature of the writ de dote assignanda appears very clearly; and on it there are no damages, "because there is no deforcement of the widow, who is put to no trouble, but has a summary remedy provided for her." Where, therefore, according to these authorities, the dowress, her title not being disputed, merely resorts to equity to have her dower set out, she will not have a right to damages for past arrears.

*The question remains, whether the dowress is entitled to damages where the heir has not only refused to set out the dower, but has denied the right to it. [317]

Coke, without giving his own opinion upon this subject, says(h) he has "read, in an ancient and learned reading upon the Statute of Merton, that it extendeth only to a writ of dower unde nihil habet, and not to a writ of right of dower; for in no writ of right are damages to be recovered." The statute does not in its terms suggest any distinction between the two writs; its relief is to be given to widows "who are deforced of their dowery;" and a widow is as much deforced of her dower, where the heir denies her right to it, as where, admitting her right, he refuses to assign the dower. There is no case at law upon this point; but in equity it has been decided in favour of the widow's right to the mesne profits, where the heir denied her right. In *Curtis v. Curtis*,(i) a suit in equity by a widow for her dower, the heir denied the marriage of the widow, and put her to proof of it. The Court retained the bill, with liberty to the plaintiff to try her right by action at

(d) Doe v. Roache, Ca. temp. Hardw. 373.

(f) 33, a.

(h) Co. Litt. 32, b.

(e) P. 24.

(g) 2 Bro. C. C. 630.

(i) 2 Bro. C. C. 620.

law. She accordingly sued out her writ of right of dower, and obtained a verdict. She then, in the suit in equity, claimed the mesne profits, and they were decreed to her, Lord Alvanley observing, "If the heir, instead of contesting the widow's right, had admitted it, she would have been entitled to her decree for mesne profits; and his having thrown an impediment in her way shall not make any difference." Since the statute only gives the mesne profits to such widows as have been "deforced of their dower," and, in construction of law, a widow is not deforced by the heir simply retaining possession of the entirety of the husband's lands, for the heir holds by title, and does no wrong till a demand is made upon him, it is necessary, before the *widow can at law have the benefit of the statute, that she should have made a demand of her dower; for it [*318] is a good plea by the heir to her claim, that he has been always ready to assign dower; and, if this be pleaded, the widow must reply and join issue, otherwise her claim will fail.(k) If the heir omit to plead this, he cannot afterwards have the benefit of the circumstance that no demand was made.(l) This plea cannot be pleaded by an alienee from the heir; for he cannot say he was always in possession, nor, of course, that he was always ready to assign dower.(m) The alienee of the heir, therefore, is liable in mesne profits from the husband's death, whether demand of dower have been made by the widow or not.

It is not necessary, however, that the claim of the widow should have been made by legal process—an extra-judicial demand is sufficient;(n) neither is it necessary, in order to entitle the dowress to the mesne profits, that the demand for dower should have been actually refused—it is sufficient that the demand was made, and that the dower was not, in fact, assigned, for whatever reason. Thus, where the demand was made upon the heir, who was an infant under guardian, and he was prevented by his guardian from assigning dower, the widow, nevertheless, had judgment for the mesne profits.(o)

Parke says,(p) "It seems that Courts of equity, following the analogy to damages under the Statute of Merton, will not entertain a bill for mesne profits where the husband *did not die seised*." And in Mitford on Pleadings(q) it is said, "As arrears of dower can be recovered at common law only from demand, the same rule was adopted in Courts of equity, unless particular *circumstances had occurred to warrant a departure from the course of the common law founded on the terms of a statute." Roper(r) [*319] disputes both these propositions, and holds that Courts of equity do not proceed in this matter with reference to any legal rule, but consider the widow as having a title to endowment immediately upon the death of her husband; and this title as drawing to it a right to an account and payment of the profits of her share, drawn by the heir, who should have endowed her. There is no express authority to decide between these conflicting opinions, as to the necessity, in equity, either of the husband having died

(k) Co. Litt. 32, b., 33, a.

(l) Dobson v. Dobson, Ca. temp. Hardw. 19; Kent v. Kent, Bull., N. P. 117.

(m) Co. Litt. 33, a.

(n) Ibid. 32, b.

(o) Corsellis v. Corsellis, Bull. N. P. 117.

(p) Parke on Dower, 332.

(q) P. 122, 4th edit.

(r) Vol. 1, p. 453.

seised, or of prior demand of dower having been made, in order to entitle the widow to mesne profits; but, upon principle, it would appear that the opinions of Parke and Mitford are well founded as to both. Where there is a right, both at law and in equity, there may be no remedy at law, while there is one in equity. But where there is no right at law there cannot be one in equity, in regard to an estate entirely legal, which dower is. The law originally gave the widow no right to dower, but from the time of assignment; afterwards, special statute gave it, from the time of the husband's death, to such widows as were deforced, which the law has construed to mean, such widows as have demanded, but have nevertheless been kept out of their dower by the heir neglecting to assign it, and then only of the lands "whereof their husbands died seised." At law, then, the widow never had a right to anything but dower from the time she demanded it; and as equity never interferes to give a right where none exists at law, but only to give relief where there is a right, which the peculiar rules of courts of law, in the administration of justice, prevent being asserted, there is no room for [*320] the interference of equity to give past profits in lieu of dower, before the time at which dower was demanded, or to give them where dower had been previously demanded out of lands, in which the husband was not seised, when no right in either case exists at law. *Curtis v. Curtis*(s) is no authority to the contrary; there the right to mesne profits existed at law as well as in equity: demand had been made, but the power to recover at law had been lost at the death of the heir in the course of the proceedings, owing to the rule in courts of law, that damages, in which character the mesne profits are, by the terms of the statute, to be recovered, are personal, and die with the person; whereas the power to recover remained in equity, from the rule in courts of equity that rights are to be adjudicated upon as they existed at the time the suit was instituted.

It was in this sense, apparently, that Lord Alvanley, in *Curtis v. Curtis*, assented to the argument for the widow, that equity gave a further remedy "than the law will do." It is no doubt true that his Lordship says, "the course of the Court seems to have been to assign to her dower, and universally to give her an account, from the death of her husband." But, in the first place, this was not said as distinguishing the rule in courts of equity from the rule in courts of law; for, in a passage shortly before, his Lordship put into the mouth of the widow the statement, that the law gave her dower out of the estate of her husband, "and the mesne profits from his death," which, as has been shewn, it does not do, unless the dower has been demanded; and therefore, in the second place, both of these observations must be taken *secundum subjectam materiam*, and, according to the facts of the case in which they were made, dower had been demanded, and the only difficulty was, not whether the right existed in equity while it did not in [*321] law, *but whether, while existing both at law and in equity, the power of recovery, though gone at law, still remained in equity.

No doubt, however, so far as regards the necessity for previous demand, the claim for mesne profits has been allowed in two cases, as a set-off in account between the widow and the heir, where no demand, so far as appears, had ever been made; but, in both of these cases, the widow had been in

possession of the entire lands from the time of her husband's death, in the one(*t*) as the guardian, and in the other(*u*) as the trustee of the heir; and in both the heir, while he required an account of the rents and profits received by the widow, consented to her taking credit in that account for a sum corresponding to her dower, and neither admitted nor disputed her *right* to this allowance. Neither of these cases, therefore, is any authority for the proposition that equity will dispense with a previous demand for dower, and will give the mesne profits for the period between the death of the husband and the date of the demand.

With regard to the other proposition, that where a previous demand for dower has been made, equity will give the mesne profits between the death and the date of the demand out of lands of which the husband did not die seised, there is no decision for or against such a departure from the terms of the statute 20 Hen. 3, c. 1. For the reasons before hazarded, the opinions stated by Parke and Mitford, upon both of these propositions, seem more deserving of assent than the doctrine laid down by Roper.

Coke says, (*v*) if the heir or his feoffee "assign dower, and the wife accepteth it, she loseth her damages." In such a case, she is not deforced of her dower, and is consequently not within the purview of the statute. If, *therefore, some time should have elapsed before the assignment, the only case to which this passage in Coke can have reference, the [*322] widow will be without a remedy for the arrears between the date of her husband's death and the period of assignment.

At law, if the tenant die during the proceedings for recovery of dower, although the right for the future is unaffected by the death, the right to dower for the time past, or to the damages which come in place of it, is lost, unless indeed the dowress had recovered judgment against two tenants, and only one of them had died. In such case, the damages would be leviable from the survivor, whom the law regards as a joint trespasser with the deceased. (*w*) The reason why the damages are lost in the case of the death of the tenant is, that the Courts of law have not treated the damages as ascertained by the value of the lands, but as uncertain, and to be ascertained, like other damages, by the verdict of a jury. Accordingly, they have treated the claim, like other claims for damages *ex delicto*, as dying with the person; (*x*) and they have drawn the same consequence where the dowress herself has died, and have refused recovery of the damages to the executor of the widow. (*y*)

It is not so, however, in equity; for there the Courts have felt themselves at liberty to give a further remedy than the law will do, and to relieve the widow where the obstacle to the recovery of her dower, in the lifetime of the tenant, was unconscientiously thrown by him in her way. If, therefore, the heir, instead of admitting the widow's right to dower, put her to assert it by suit in equity, the Court will not allow the impediment he has thus thrown in her way to operate to her prejudice; but, where the right is as-

(*t*) *Hamilton v. Mohun*, 1 P. Wms. 122.

(*u*) *Graham v. Graham*, 1 Ves. sen. 262.

(*v*) Co. Litt. 33, a.

(*w*) *Kent v. Kent*, 2 Strang. 971.

(*x*) *Aleworth v. Roberts*, 1 Lev. 38; *Curtis v. Curtis*, 2 Bro. C. C. 629.

(*y*) *Mordant v. Thorold*, 1 Salk. 252.

[*323] *certained, *will give her full relief by decreeing payment of the rents and profits up to the time of its decree, whether the tenant or the dowress be dead, upon the principle recognised by Courts of equity, that relief is to be given according to the rights as they existed at the institution of the suit. Whether a Court of equity would feel itself at liberty to give mesne profits where the heir had died before the institution of the suit, has not been determined. The question was argued in Curtis v. Curtis, but not decided.(z)*

Previous to the 3 & 4 Will. 4, c. 27, it was decided, in one case,(a) that, as the Statute of Merton did not ascertain the time for which the damages were to be given, there was no limit in law to actions for arrears of dower, or for damages in lieu of it; and that the widow was, therefore, entitled to them from the time her title accrued; and the Court refused to confine the claim to the period subsequent to the filing of the bill, although no excuse was assigned why proceedings at law or in equity had not been sooner adopted. But the 41st section of 3 & 4 Will. 4, c. 105, enacts, that, after the 31st December, 1833, no arrears of dower, nor damages on account of such arrears, can be recovered by any action or suit for a longer period than six years before the commencement of such action or suit.

The rights of the widow to her dower, and to damages in lieu of it, are separate and distinct, it must be remembered, so that a release of the one will not bar the other;(b) and it may be, that the judgment to recover dower may be affirmed upon error and stand good, while the judgment to recover damages may be reversed.

Recovery of damages, estimated by the amount of the dower for the time past, will not in every case place the *widow in the same situation [*324] in which she would have been had the heir assigned her dower immediately upon the death of her husband. Her dower may have been all she had to depend upon for her subsistence, and she may have been constrained to borrow money at interest to supply its place. The Court of Common Pleas, in Walker and Nevil's case,(c) disallowed an exception to a verdict that it assessed an amount exceeding one-third of the rents, as damages for detention of dower, "for, it may be, by the long detaining of the dower, the demandants have sustained more damages than the bare revenue." The Court thus appears to have sanctioned a compensation to the widow beyond the exact amount of the dower, and to have acted upon a rule, followed in courts of law, of allowing *interest* to be recovered in the shape of damages. With regard to the rule of Courts of *equity* upon this subject, there is little, (if any) direct authority; indeed, it seems to be limited to a statement of counsel in Tew v. Winterton,(d), that, in Lindsay v. Gibbon, (an unreported case), Lord Loughborough said, "There were no cases that warranted giving interest upon dower." The matter is not further noticed by Parke than by a reference to this case.(e) Roper (f) states the rule of the Courts broadly to be, "not to allow interest upon arrears of

(z) Curtis v. Curtis, 2 Bro. C. C. 629.

(a) Oliver v. Richardson, 9 Ves. 222.

(b) Harvey v. Harvey, T. Raym. 366.

(d) 3 Bro. C. C. 495.

(f) Vol. 1, p. 457.

(c) 1 Leon. 56.

(e) Parke on Dower, 332.

dower :” and he refers to several cases as authorising the rule thus stated, and the assertion that “the rule is considered to be so absolute as to render it doubtful whether it will be relaxed in the most distressing cases.” But all of the cases to which he refers relate to interest upon arrears of *annuities*, and are altogether silent as to arrears of dower. From what authority this author derived the observation just quoted, the justice of which he disputes and proceeds to combat, is not apparent ; nor does there seem to be any authority whatever in support of it, other than the dictum imputed to *Lord Loughborough, in *Tew v. Winterton*. The supposed rule is considered by Roper to rest upon an analogy to the rule of the [*325] Court as to arrears of annuities. As to these, the rule of the Court, as observed by Lord Cottenham, in *Booth v. Leycester*,^(g) to have been followed by Lord Thurlow in *Tew v. Winterton*, and by Lord Rosslyn in *Creuze v. Hunter*,^(h) is, not to allow interest upon annuities, even where they have been given for the maintenance of the annuitants. But this does not necessarily bear upon the question, whether interest should be allowed upon arrears of *dower* ; for Lord Loughborough, in *Tew v. Winterton*, while refusing interest upon an annuity, said, the Court never gave it “but where there has been some ground from whence it could gather that there was a contract between the parties that interest should be paid ;” obviously inferring, that, where the ground is wanting, the Court must conclude that the parties did not intend that it should be given ; and the same conclusion may be drawn where the annuity is the subject of gift, whether by will or otherwise, and no mention of interest is made in the gift. But there are no grounds for this conclusion in regard to interest upon arrears of dower, seeing the estate of dower is the creation of law, and, therefore, it could not be in the power of the parties to make any previous provision as to interest. No assistance, therefore, as it appears, can be drawn from the cases upon arrears of annuities.

If, however, interest upon arrears of dower can be obtained *at law* in the shape of damages, under the terms of the Statute of Merton, it will be somewhat singular if it cannot also be obtained in some form in courts of *equity*, which, as was said in *Curtis v. Curtis*,⁽ⁱ⁾ “give further remedy to dowresses than they can have at law, even in cases where there is no impediment to prevent their recovery there.”

*CHAPTER XII.

[*326]

OF THE BAR TO DOWER UNDER THE STATUTE OF USES AND UNDER THE DOWER ACT, 3 & 4 WILL. 4, C. 105.

PREVIOUS to the Statute of Uses, 27 Hen. 8, c. 10, dower was a freehold burthen, to which the property of every man was subject in the event of

(g) 3 My. & Cr. 468.
(i) 2 Bro. C. C. 628.

(h) 2 Ves. jun. 157.

his marrying, unless previous to coverture he adopted the means then open to him of preventing its taking effect.

If before marriage the husband, by agreement between him and the wife, she being adult, had made any provision for her which she accepted in lieu of dower, Equity, acting upon the jurisdiction which it has at all times exercised of enforcing agreements between parties competent to enter into them, would have enforced the agreement as a bar to dower, upon the footing of preventing a double satisfaction, viz. the enjoyment of the provision and likewise of dower.^(a) If the provision had been made by the husband before marriage, without any agreement with the wife, or acceptance by her, although equity could not have enforced the provision as a bar to dower, it would at all times have put the widow to elect between the provision and the dower, and would not have allowed her to enjoy both. At law the matter was otherwise, for dower is a freehold estate, and, as a freehold cannot in law be barred by a collateral satisfaction, no provision made by the husband, either by agreement or without it, could have been pleaded in satisfaction of the dower; neither was it possible for the intended wife to release the dower, for until *marriage the estate was not in her to release. There was nothing, therefore, in law to prevent a widow taking a provision made for her by her husband, and likewise claiming her dower, not only of the lands he possessed at the time of the marriage, but of all he had acquired during the coverture. Neither was there, as has been seen, anything in equity to prevent the widow rejecting a provision made for her without her consent and taking to her dower.

The method that was fallen upon to prevent these inconveniences at law and in equity, and to bring the amount of the provisions for the wife within control and certainty, was to defeat the maxim of law, that dower could not be barred by a collateral satisfaction, by bringing into play the other equally operative maxim, that there could not be dower of a Use.

That was accomplished after this manner: the intended husband conveyed his whole lands to feoffees to uses, and then gave the intended wife such estate from the feoffees as was agreed upon with her and her friends, as a jointure in lieu of her dower; and the titles of such lands as the husband acquired during the coverture he likewise took in the form of a conveyance to uses.^(b)

Such was the course adopted prior to the Statute of Uses^(c) for preventing dower attaching. But when that statute transferred the seisin and possession to the use, and so re-vested in the husband the seisin of the lands he had conveyed to uses, and thereby made them subject to dower, if nothing more had been done, the consequence would have been, that widows would, in law at least, have been entitled not only to the express provision which their husbands had given them, but also to their dower of the residue of his lands. To provide a remedy for this, the 6th section of the Statute of Uses^[*328] enacted, that whenever *lands had been, or should be, settled for the jointure of the wife, the wife should have no claim for dower of the residue of her husband's lands; and the 7th section contained a proviso, that, if she should be evicted from any part of her jointure, she should be

(a) *Buckinghamshire v. Drury*, 2 Eden, 74.

(b) *Vernon's case*, 4 Co. Rep. 2.

(c) 27 Hen. 8, c. 10.

endowed of so much of the residue of her husband's lands as the lands from which she had been evicted should amount to. If, therefore, the jointure had been originally bad, from defect in the title of the husband, this did not entitle the wife to reject the jointure and claim her dower after the defect of title might have been remedied; for, even if the defect had not been remedied, all that she could have asked would have been the benefit of the proviso of the statute.(d) The jointure, as such, was good enough; all that could have happened would have been eviction for defect of title, in which case the proviso of the statute would have applied, entitling her to endowment from the residue of the husband's lands.

Another proviso, in the 9th section, enacted that the wife, after the death of the husband, should have liberty to refuse to take the lands given to her in jointure, where the jointure had been made after marriage by assurance for term of her life or otherwise, and thereupon to claim her dower, according to the common law.

The Statute of Uses, therefore, gave a man, before marriage, power to bar the dower of his intended wife, by making a provision for her in satisfaction of it; but if he omitted to exercise this power, then there were no means open to him by which he could, during the coverture, prevent the widow from claiming her dower in preference to any provision he might have made for her by will or otherwise.

The Dower Act, 3 & 4 Will. 4, c. 105, has completely altered the law upon this subject, as to all women married *after the 1st of [329] January, 1834, and has put their right to dower entirely within the control of the husband, to be exercised, at his option, before or during the coverture. By the 4th section, if the husband dispose of any part of his lands by deed during his life, or by his will, no dower is claimable out of the part disposed of. By the 5th section, dower is to be postponed to all partial estates and interests, and all charges which the husband may have created by will or disposition, and to all debts, incumbrances, contracts, and engagements to which his lands are subject or liable. By the 6th and 7th sections, the husband may bar dower by a declaration to that effect in the deed by which the land is conveyed to him, or in any other deed, or by his will, by such a declaration as to his lands generally, though as to some of them he may have died intestate. By the 8th section, dower is to be subject to any conditions, restrictions, or directions which the husband may declare by his will. And by the 9th section, if the husband devise to the wife any land out of which she would be dowable, or give her any estate or interest in it, she will not be entitled to dower out of that or any other part of his lands, unless a contrary intention is declared by his will.

The 14th section declares, that the act shall not extend to the dower of any widows who shall be or shall have been married on or before the 1st January, 1834; and that it shall not give to any will, deed, contract, engagement, or charge, executed, entered into, or created before that day, the effect of defeating or prejudicing the right to dower.

The law, therefore, remains as it existed previous to this statute, in regard to all women married on or before the 1st January, 1834, and in regard to all deeds, contracts, engagements, or charges of a date prior to

(d) *Corbet v. Corbet*, 1 S. & S. 620.

that. It will be necessary, therefore, to consider here what the law under the Statute of Uses still is, notwithstanding the Dower Act, in regard to the power of the husband to defeat the widow's *claim to dower, by a [*330] provision made by him for her before or during the coverture, where marriage took place prior to or on the 1st January, 1834, and even where marriage took place subsequent to that date, if the case, in its circumstances, is not one to which the statute of William 4th applies.

CHAPTER XIII.

OF THE LEGAL BAR TO DOWER BY JOINTURE UNDER THE STATUTE OF USES.

§ 1.—Of the Value of the Jointure, as compared with the Dower, required in order to make it a Bar under the Statute.

THE Statute of Uses having, then, as already mentioned, declared, by its 6th section, that the widow should not have a claim for dower where lands had been settled upon her by way of jointure, it becomes necessary to consider what is the jointure which will satisfy the provisions of that statute, so as to form a valid bar to the claim of dower.

In this 6th section, five forms of jointure are enumerated, viz.—*First*, to the husband and wife, and to the heirs of the husband. *Second*, to the husband and wife, and to the heirs of their two bodies. *Third*, to the husband and wife, and to the heirs of the body of one of them. *Fourth*, to the husband and wife for their lives. *Fifth*, to the husband and wife for the life of the wife. Yet it was resolved, in Vernon's case,^(a) that these forms [*331] *were only put for examples, and that many other estates, not there expressed, were within the act; and that it was not necessary, although the examples given were all of that nature, that the estate should be a *joint* one to the husband and wife, as the word *jointure* seemed to import, if the estate in fact limited were as beneficial to the wife; for the statute speaks of *jointure* "for terms of life or otherwise;" and in a previous case^(b) it had been resolved, that a settlement of lands upon the husband and wife, and their heirs, under which the wife by survivor took a fee-simple, was a good bar to dower.

In considering how far a jointure under the Statute of Uses is as beneficial to the widow as her dower, there are several particulars to be attended to, both as to the value of the jointure and the mode in which it is to take effect. But it may be observed, that if the jointure had been made *during* the coverture, the widow is protected by the 9th section of the Statute of Uses against its inadequacy, as compared with her dower, by having the power to reject the jointure and take to the dower. If the jointure had been made *before* coverture, the wife, by the 6th section, is bound by it, and

(a) 4 Co. Rep. 2.

(b) Dennis's case, Dy. 248, a.

there is no provision which makes her previous knowledge and assent necessary; and if the intended wife were adult at the time of such a jointure being made, and were, after the termination of the coverture, to assent to it, there is no reason why it should not so operate. Accordingly, in *Carruthers v. Carruthers*,^(c) Sir R. P. Arden, M. R., said, "I do not say, that if the woman had been adult, she might not have bound herself; she might have taken a provision out of the personal estate, or she might have even taken a chance in satisfaction of her dower, acting with her eyes open." But to give the statute the effect of barring a woman from her dower, if her husband, before *marriage, and behind her back, had made a jointure upon her of any kind whatsoever, might obviously, in many [*332] cases, have operated most serious injustice: to avoid this, the Courts laid down, that a jointure, in order to be effectual to bar her dower, must have certain qualities and incidents.^(d)

The first and most obvious question which will occur, in comparing the jointure with the dower, is the relative annual value of the two. Upon this subject the statute is altogether silent. Coke^(e) says, that a jointure must be a competent livelihood; but, in enumerating the requisites to a good jointure,^(f) he does not place adequacy of amount among the number, although it must be an important consideration in every case. Lord Northington, in *Drury v. Drury*,^(g) where the question was raised in argument, said, "that the jointure to bar dower is of no defined value; and if it be made up of the qualities and incidents specified, it is a legal bar, and every Court of law is bound to accept it as such;" and that, if it were said to be disproportionate, he was at a loss to find any foundation for relief on the ground of fraud. "What measure," asked his Lordship, "is the Court to make of this disproportion? The husband's estate?—the wife's fortune?—her family?—her person?—her endowments? I am lost in the impossibility of equity interposing, and frightened with a jurisdiction that I should attempt to introduce."

As dower, until the Dower Act,^(h) was claimable, not only out of the lands which the husband possessed at the time of the marriage, but out of those which he might acquire during its subsistence, it was impossible, *a priori*, to fix any provision which should be adequate in amount to the dower. The Legislature, do doubt, impressed with this difficulty, did not attempt, in the Statute of Uses, to grapple *with it, in regard either [*333] to those women who had been married prior to the date of the statute, or to those women who should be subsequently married, but provided generally that jointure, whatever the value might be, should bar dower. With regard to women who had been married prior to the Statute of Uses, this must in many cases have been the source of cruel injustice; but, with regard to women to be thereafter married, the statute did not expose them to any inconvenience—it left them to arrange with their intended husbands in each case what fixed provision they would be disposed to take in lieu of the dower, which necessarily could not be fixed or ascertained until the husband's death; and assumed, that thenceforth the provision to be made for

(c) 4 Bro. C. C. 511.

(e) Co. Litt. 36, b.

(g) 2 Eden, 57.

(d) *Buckinghamshire v. Drury*, 2 Eden, 74.

(f) Ibid.

(h) 3 & 4 Will. 4, c. 105.

the widow would form part of every treaty for marriage; and in practice this proved to be the case.

Where a jointure, not falling under the Dower Act,⁽ⁱ⁾ has not been matter of treaty before marriage, and has been made by the husband *ex proprio motu*, the wife is without remedy, upon the ground of its inadequacy in value, even although she might have been an infant at the date of the marriage; for in Vernon's case^(k) it was resolved, that the intention of the statute was, that, "if the jointure were made before marriage, she should not refuse, but take *such* jointure as was made to her." No doubt, in *Buckinghamshire v. Drury*,^(l) Lord Hardwicke says, that "an infant having a *proper jointure* made is bound and barred by it" in law; and that it will bind in equity—indicating that she would not be bound by it if it were not proper; but he nowhere intimates what is a "*proper jointure*;" and in the case in which he used this expression it was not necessary that he should have done so, for the objection to the jointure was rested entirely [*384] upon *infancy*; **inadequacy* was introduced merely by way of argument; and the decision went upon this, that the law, from ancient times, had recognised the marriage of infants, and intrusted the negotiations for it to their parents and guardians; so that infancy was no objection *per se*, and in this respect infants were in the same condition as adults. There does not appear to be any case where a jointure, not coming under the Dower Act,^(m) palpably inadequate as compared with the dower of the husband's lands possessed by him at the time of the marriage, and not accepted by the wife, had been complained of on the ground of inadequacy; and, if such a case should occur, it does not seem that the wife would have any remedy, or that there are any media by which the Court could test the adequacy of the jointure. ■

§ 2.—Of the Mode and Form of the Jointure required in Law to make it, under the Statute of Uses, a Bar of Dower.

The difficulties presented to any other than a literal construction of the Statute of Uses, in regard to *value*, did not occur in regard to the *mode and form* of making a jointure. Upon these subjects the Courts adopted an equitable construction of the statute, in saying what a jointure, in mode and form sufficient to bar dower, ought to be. Coke, accordingly,⁽ⁿ⁾ lays down, for this purpose, six requisites in a jointure:—

First, he says, the jointure must take effect in possession of profit presently after the decease of the husband. If, therefore, the jointure, in its creation, had been so limited as that an estate, either for life or for years, would take effect in possession after the death of the husband, and before the estate given to the wife, the jointure would not be such as would [*385] **bar* her of her dower; and this will be the case although by the death, in the lifetime of the husband, of the party to whom the intermediate estate is limited, there should not in the result be any thing to prevent the

(i) *Ibid.*

(k) 4 Co. Rep. 3.

(l) 2 Eden, 57.

(m) 3 & 4 Will. 4, c. 105.

(n) Co. Litt. 36, b.

widow's estate taking effect immediately upon the death of the husband ;(*o*) for, as it was not in construction of law a jointure at first, whatsoever happens afterwards shall not make it to be one. This rule would hold equally in equity as at law.

Secondly, the jointure must be either in fee-tail or for term of the wife's own life. A jointure, therefore, for the life or lives of one or many others will not bar dower, neither will one for a hundred or a thousand years, if the wife so long live.(*p*) In the first case, the wife may survive those upon whose lives the jointure is limited ; and in the second, the estate is for years, and not for life, which is the estate declared by the statute to be a bar to dower. Certainly, if the wife were to accept a jointure made for her before marriage, which, in its inception, might not be of so long endurance as her own life, though this would not at law be a bar to her dower, it would in equity, upon the footing of its being the wife's own agreement, made while she was competent to enter into it, which ought therefore to bind. Accordingly, there are instances in equity of an agreement by the wife to accept a term for years,(*q*) a life-estate in copyholds,(*r*) and a bond for an annuity not secured upon any land,(*s*) being sustained as sufficient to bar the widow's claim for dower, in satisfaction of which the provision had been made and accepted by her. Roper says,(*t*) that if the jointure be for the life of the wife, it will be good, although a condition be annexed to the performance or non-performance of something within *her own power, as if it be made upon condition that she perform her husband's will, or durante viduitate ; and as authority for this, he refers to Vernon's case.(*u*) There, however, the jointure was one which had been made *after* marriage ; and the only question was, whether the wife's acceptance of it after the death of her husband deprived her of the benefit of the 9th section of the statute, which gives widows power to reject a jointure made *after* marriage, and claim their dower. It was held, that the acceptance did deprive the widow of the benefit of this provision of the statute ; but that is no authority for holding that a jointure upon condition made *before* marriage, which is not waivable by the wife, or in any way dependent upon her consent, would be good to bar dower under the statute, which speaks only of an absolute estate of freehold. Undoubtedly, the reasoning in Vernon's case was unnecessary, if the acceptance by the wife was sufficient to determine the question ; for in that view it was immaterial what the nature of the jointure was, whether it was or was not within the terms of the statute ; but the decision cannot be looked upon as any other than one upon the species facti of the particular case. And yet it must be confessed, that Coke's words, that a jointure is a provision "for the life of the wife at the least, if she herself be not the cause of determination or forfeiture of it," apply as well to jointures made *before* as to those made *after* marriage.

Thirdly, another quality laid down by Coke as requisite in a jointure to bar dower is, that it must be made to the wife herself, and not to others in trust for her ; and he says, that if it be made to others it will not be a

(*o*) Co. Litt. 36, b ; Wood v. Shurly, Cro. Jac. 489.

(*p*) Co. Litt. 36, b.

(*r*) Lacy v. Anderson, Id. 445, n.

(*t*) Vo. 1, p. 467.

(*q*) Rose v. Reynolds, 1 Swanst. 446, n.

(*s*) Vizard v. Longder, 2 Eden, 66.

(*u*) 4 Co. Rep. 1.

bar, although she expressly assent to it as such.(v) In law, no doubt, this is so,(w) but in equity it is otherwise. There, if the *provision [337] answer the intention of the statute in other respects, as to certainty of duration and profit, it will be supported as a bar to dower, although it should be made in the form of a trust. This was ruled in *Corbet v. Corbet*,(x) where the wife had been an infant at the time of the marriage. Sir J. Leach, V. C., said, that the assent of the father or guardian removed the objection which arose from the equitable quality of the jointure, leaving the obvious inference, that the only doubt arose from the infancy of the wife; and that if she had been adult the equitable quality of the jointure would not have supported an objection to it.

Fourthly, a fourth requisite to a good jointure to bar dower is, that it must be made in satisfaction of the *whole dower*, and not of a part only.(y) If the jointure be expressed to be in satisfaction of dower generally, the bar will be good; but if of part only, without specifying what part, it will, as a bar, be void for uncertainty as to which part.(z) It would likewise seem that the *jointure* must be entire, in order to form a bar; for in *Vernon's case* it is said, that if lands be conveyed to a woman before marriage for *part of her jointure*, and after marriage more land is conveyed to her for her *full jointure*, and in satisfaction of her whole dower, if she waive the conveyance made after marriage, she will be entitled to enjoy the lands conveyed to her before marriage, and to have likewise her dower of the residue of her husband's lands; for the bar is, in this case, also void for uncertainty; inasmuch as the wife's waiver, which, by reason of the conveyance having been made after marriage, the 9th section of the statute gives her a right to exercise, made the second conveyance inoperative to ascertain the full jointure. If the deed creating the jointure specify the [338] lands in respect of which it is intended to operate as a *bar of dower, there seems no reason why the jointure should not so operate in regard to these particular lands; for uncertainty is out of the question.

Fifthly, Coke says, the jointure must "either be expressed or averred" to be in satisfaction of dower. At the time at which Coke wrote, it was, at law, sufficient to aver that the jointure had been made in satisfaction of dower, and to support this averment by parol testimony, as was allowed in *Vernon's case*,(a) and in *Tracey v. Ives*.(b) Roper,(c) however, thinks the law was afterwards altered in this respect by the Statute of Frauds,(d) which, in its 3rd section, enacts, "that no estate of freeholds in lands shall be assigned, granted, or surrendered, unless by deed or note in writing, signed by the party or his agent;" "because," he says, "if oral testimony were admissible to add to the instrument what is not expressed in it, viz. that the provision for the wife was intended as a jointure, the effect would be to allow a surrender of her freehold title to dower by *parol*, when the statute requires it to be made in writing;" and he quotes, in support of this, a decision of Lord Hardwicke, in *Tinney v. Tinney*,(e) where he said, that

(v) Co. Litt. 36, b.

(x) 1 S. & S. 620.

(z) *Vernon's case*, 4 Co. Rep. 3.

(b) 1 Leon. 311.

(d) 29 Car. 2, c. 3.

(w) *Hervey v. Hervey*, 1 Atk. 563.

(y) Co. Litt. 36, b.

(a) Dy. 317, a.

(c) Vol. 1, p. 471.

(e) 3 Atk. 8.

"parol evidence could not be allowed, being within the Statute of Frauds and Perjuries." A distinction, however, must be drawn between jointures made *prior* to and those made *during* coverture, or "after marriage," as the statute of 27 Hen. 8, c. 10, expresses it. By that statute, as has been seen, a jointure made *prior* to marriage operates as a bar to dower. The deed, therefore, creating the jointure operates neither as a grant by the wife of her estate of dower to the husband, nor as a surrender of that estate to him, but as a statutory bar to the existence of the estate at all. If this view be correct, it does not seem that the *Statute of Frauds has made any change in the law, as it existed in Coke's time, in regard [*339] to the sufficiency of an averment at law, supported by offer of parol testimony, that a jointure made *prior* to marriage was intended to be in satisfaction of dower. With regard, on the other hand, to jointures made *during* the coverture, or "*after marriage*," the case is different. The wife's estate of dower was inchoate, and had existence from the time of the marriage; and if the jointure is to have any operation upon this estate, which, by the 9th section of the 27 Hen. 8, c. 10, it can only have at the election of the wife, it would seem that such operation must be as a surrender and grant of the estate of dower to the husband. But even then the Statute of Frauds would not apply so much to the deed creating the jointure as to that by which the wife accepted of it, for by it is the surrender and grant accomplished. Accordingly, in *Tinney v. Tinney*, the case referred to by Roper, and in which, from the statement of the facts, the provision appears to have been made during the coverture, the averment was, that the provision "was intended in lieu of dower, and that the wife acknowledged it to be so;" and the offer of proof was not as to the terms in which the deed creating the provision was expressed, but as to the terms of the "acknowledgment;" and the words "*acknowledged*" and "*acknowledgment*" are here evidently used for "accepted" and "acceptance;" for the wife's *acknowledgment* of what her husband's intention was, supposing the provision to have been made during the coverture, mattered nothing, unless it was accompanied with her *acceptance* of it.

If this be the correct view, the rule at law remains, as stated by Coke, that a jointure, to be a good bar of dower, must either be expressed or averred to be in satisfaction of it. That this is the correct view seems to be supported by a decision of Sir E. Sugden, in *Hamilton v. Jackson*.(f) There, by *articles, in contemplation of marriage, it was agreed, that, in case the husband should die in the life of the wife without issue by [*340] her, she should be entitled to one full half of the real or personal property of what kind soever the husband should die possessed. Sir E. Sugden ruled, that the wife was not entitled, upon the death of the husband without issue, to take one-half of his real estate, and claim her dower out of the other, "as the contents of the covenant shewed that the provision thereby made was in the given event a substitution for dower:" a decision which seems in close analogy to that of Lord Eldon, in *Gartshore v. Chalie*,(g) where he held, that a widow was not entitled to take the provision given by her marriage settlement, and at the same time to claim her share of the personality, under the Statute of Distributions. In enlarging upon this

(f) 2 J. & L. 295.

(g) 10 Ves. 1.

subject, Coke says, "A devise by will cannot be averred to be in satisfaction of dower unless it be so expressed in the will."^(h) And if the gift be an interest affecting merely personal estate, it will not, in the absence of any express declaration that it was intended to be in satisfaction of dower, raise an implication to that effect; for the claim of dower no way disturbs the disposition of the husband's personal estate made by the will,⁽ⁱ⁾ although, by the same will, the land of which the widow is dowable should be expressly devised to another, but not in terms obviously excluding her dower.^(k) The cases are numerous in which questions of this nature have arisen. Each case, however, only exhibits the view which was taken by the Court of the terms used in the particular will, as indicating or negating an intention by the husband, that the provision given by it should be accepted in lieu and satisfaction of dower.

The rule at law, that a jointure in order to bar dower *must be [*341] expressed or averred to be in satisfaction of it, is equally recognised in equity; for a provision made by the husband for the wife, in the absence of anything else to shew that it was intended as a satisfaction of dower would be ineffectual in equity to bar the widow from claiming the dower, and at the same time enjoying the provision.

But although a devise or bequest will not bar the dower, unless it be expressed to be given with that view, it is another question whether the widow^(l) shall be entitled to take her dower, and at the same time claim the benefits given by her husband's will. The doctrine to be extracted from the cases upon this subject seems to be, that the widow cannot claim her dower, and at same time take a benefit under her husband's will, where that benefit was intended, although not expressed by him, to be in satisfaction of the dower. The following rules upon this subject will be found in the cases:—*First*, a devise to the widow of part of the lands of which she is dowable, with a devise of the residue to other parties, will not per se shew an intention that the devise to the widow was intended to be in satisfaction of dower; for the devise of the residue will be presumed to have been made only of what was in the husband, i. e. of the land burdened by the claim for dower to which it is subject by the general law.^(m) *Secondly*, if the husband devise to the wife an estate in his lands of such a nature and quality, and so mixed up with estates given to others, that none of the estates can be enjoyed as they are given, should the widow's claim to dower be allowed to intervene, it will be presumed that the estate given to the wife was intended to be in satisfaction of dower; as if, specifying what his lands consist of, the husband devise them to his wife and children, to be [*342] divided "equally" between them, in such terms as shew that he did not mean to devise only what interest in contemplation of law he had in the lands, but the lands themselves as described.⁽ⁿ⁾ *Thirdly*, a devise of an annual payment to the widow, charged alone upon the lands of which she is dowable, followed by a devise of the lands to other parties, in such terms as that the widow, if the devise were to have its effect, could

(h) Co. Litt. 36, b.

(i) Ayres v. Willis, 1 Ves. sen. 230.

(k) Strahan v. Sutton, 3 Ves. 249.

(l) Married prior to 1st January, 1834.

(m) Lawrence v. Lawrence, 2 Vern. 365; Lemon v. Lemon, 2 Eq. Ca. Abr. 353; Birmingham v. Kirwan, 2 Sch. & Lef. 444; Dorchester v. Effingham, Coop. 319.

(n) Chalmers v. Storil, 2 V. & B. 222; Roberts v. Smith, 1 S. & S. 513.

not have more out of the lands than her annuity, will be presumed to have been given in satisfaction of dower. In *Arnold v. Kempstead*,^(o) a devise of all the husband's lands, subject to the payment of an annuity to his widow so long as she continued his widow, was held to be a devise of this nature. But in *Dowson v. Bell*,^(p) the contrary was held, as to a devise of the husband's lands upon trust to pay the rents to his daughter till twenty-one, subject to an annuity to his widow so long as she continued such; and, upon the daughter attaining twenty-one, to divide the lands among the husband's children equally: and in *Holdich v. Holdich*,^(q) Sir J. Knight Bruce, V. C., held, that the devise of an annuity to the widow, followed by a devise of the land to a third party charged with the annuity, was not a devise in satisfaction of dower. *Fourthly*, if there be a devise of an annual payment to the widow, and of similar payments to other parties, and the rents are inadequate to satisfy these payments and the dower likewise, the annuity to the widow will be presumed to have been given in satisfaction of the dower.^(r) *Fifthly*, if there be a devise of an annuity charged upon the lands, with a proviso that it shall be made good out of the personal estate, *Pitts v. Snowden*^(s) (decided by Ld. Hardwicke, but without any reason given *in the only report of the case extant,) shews that the widow shall take both the annuity and the dower; and *Greator v. Carey*^(t) is [*343] to the same effect. But these cases are opposed by *Villareal v. Galway*,^(u) where Lord Camden said, the widow could not take both, because the claim of dower was inconsistent with the will, and, if sustained, would disappoint it; so that the case came within the rule in *Noyes v. Mordaunt*,^(v) that no person shall dispute a will who takes under it. *Sixthly*, a devise of the husband's whole estate upon trust to sell it, and apply the proceeds in a specified manner, including benefits to the wife, will not afford a presumption that these benefits were to be taken in lieu of dower.^(w) And yet, in *Reynard v. Spencer*,^(x) Lord Langdale, M. R., held, that where there was a devise of all the husband's lands upon trust to let them, and receive the rents, and out of the rents to pay the widow an annuity, and apply the residue to the maintenance of his children, the widow must elect between dower and the annuity. But, *seventhly*, if the trusts are so expressed as to shew an intention that the land should be enjoyed in a manner that it could not be if a third were set out by metes and bounds for the widow's dower, then this will afford a presumption that the benefits given to the widow under the trust were intended to be given in lieu of dower. In *Foster v. Cook*,^(y) a trust to pay the widow an annuity of £50 during widowhood, to be reduced to £30 in case of marriage, with a direction to the trustees to improve and manage the real and personal estate in the best manner they could, was not held to be a trust of this nature, or to shew any inconsistency between the gifts under the trust and the enjoyment of the dower. But in *Miall v. Brain*,^(z) a direction to trustees to permit *the husband's daughter to have the personal occupation of a particular [*344]

(o) 2 Eden, 236.

(q) 2 Y. & C. 18.

(s) 1 Bro. C. C. 292, n.

(t) 6 Ves. 615.

(w) French v. Davies, 2 Ves. jun. 572; Ellis v. Lewis, 3 Harc. 313.

(x) 4 Beav. 103.

(p) 1 Kee. 761.

(r) Pearson v. Pearson, 1 Bro. C. C. 291.

(u) 1 Bro. C. C. 292, n.

(v) 2 Vern. 581.

(y) 3 Bro. C. C. 347.

(z) 4 Madd. 125.

house, and in *Butcher v. Kemp*,^(a) and *Roadley v. Dixon*,^(b) a direction to trustees to occupy and manage a specified farm in a particular manner, were held to be trusts inconsistent with the notion that the husband intended to give the wife the benefit of the provision under the trust, and that, at the same time, her dower should be set out by metes and bounds out of the lands to which the direction applied.^(c) This consequence will follow where the whole lands are given by one devise, and the direction as to management applies to a part only; for in *Miall v. Brain*, and *Roadley v. Dixon*, the Court said, as there was a plain intention as to part of the property that it should not be subject to dower, and the whole was conveyed by one devise, it followed that the husband did not intend that any part should be subject to it. *Eighthly*, a devise of an interest in the lands out of which the widow is dowerable, to take effect in futuro, will not be construed to have been made in satisfaction of dower, as where the devise is of a life-estate after previous estates to other parties.^(d)

Before the widow is put to elect between her dower and the gift in satisfaction of it, she is entitled to know the relative value of each:^(e) and she will not have foregone her right to this, and be said to have elected the gift by having enjoyed it for a period of time,^(f) unless such enjoyment was necessarily accompanied with a full knowledge of the circumstances and of her own rights.^(g)

In *French v. Davies*,^(h) Lord Alvanley laid down, that *it was [*345] not enough to shew that the husband did not intend the widow to have her dower—it must be proved that he intended to *exclude* it; and, in *Miall v. Brain*,⁽ⁱ⁾ the same doctrine was uttered by Sir J. Leach. In *French v. Davies*, Lord Alvanley likewise laid down that a devise to others is not necessarily inconsistent with the idea of dower being claimable, because all the husband could devise was the land subject to the dower; and, in *Ellis v. Lewis*,^(k) Sir J. Wigram said, a devise of lands *eo nomine* beneficially does not per se express an intention to devise the land, otherwise than subject to its legal incidents, that of dower included.

If these doctrines are sound, and they are not controverted by the judges, by whom the various cases which have been mentioned were decided, there seems no little justice in the observation made by Sir E. Sugden, in *Hall v. Hill*,^(l) that, with regard to the widow's "right to dower, it was hopeless for any judge to expect to reconcile all the cases upon the subject—it would be impossible to do so."

It is fortunate, therefore, that the Dower Act has made any attempt of the kind hardly necessary, unless a question should arise in regard to the rights of a widow married prior to the 21st of January, 1834. As to all women married subsequent to that date, the statute makes such questions nearly impossible to arise, by declaring, in its 9th section, that a devise of any

(a) 5 Madd. 64.

(b) 3 Russ. 203.

(c) See also *Taylor v. Taylor*, 1 Y. & C. 727.

(d) *Inclendon v. Northcote*, 3 Atk. 433.

(e) *Newman v. Newman*, 1 Bro. C. C. 186.

(f) *Wake v. Wake*, 1 Ves. jun. 336.

(g) *Butriche v. Broadhurst*, 1 Ves. jun. 171; *Pasey v. Desbouvrie*, 3 P. Wms. 315; *Kidney v. Coussmaker*, 12 Ves. 151; *Reynard v. Spencer*, 4 Bea. 167.

(h) 2 Ves. jun. 576.

(i) 4 Madd. 125.

(k) 3 Hare, 313.

(l) 1 D. & W. 102.

land, out of which, but for such devise, the widow would be dowable, shall be a bar to her claiming dower; and, by its 10th section, that no gift or bequest of personal estate shall defeat or prejudice the right to dower.

The sixth requisite stated by Coke,^(m) to a jointure to bar dower, under the Statute of Uses, is, that it be made *before marriage, in which [*346] case the widow cannot waive it and claim her dower.

By the 6th section of the Statute of Uses,⁽ⁿ⁾ every jointure made to a woman is declared to be a bar to her dower: that is to say, every jointure coming within the terms of the statute. But this is qualified by the 9th section, which declares, that if the jointure had been made after, i. e., during marriage, the widow may refuse to take the jointure, and may claim her dower. In order to constitute an absolute bar, it is equally necessary, in equity, as at law, that the jointure should have been before marriage. But there is this distinction between the rule at law and that in equity, viz. at law, if the jointure, whether made before or after marriage, be not such a jointure as comes within the terms of the statute, in the respects which have been noticed, there is nothing to prevent the widow taking the jointure, and, at the same time, claiming her dower; for, if the act does not, the common law will not, in such case, conclude her of her dower.^(o) Whereas, in equity, if the jointure were intended to exclude the dower, then, whether it were made before or after marriage, and whether it came within the terms of the statute or not, the widow will not, against conscience, be allowed to claim her dower, and at the same time take that which her husband gave her in satisfaction of it.

Supposing the jointure to have been made during marriage, and to be one which comes within the Statute of Uses, and any act to have been done by the widow, after the death of the husband, which by construction might import that she had accepted it, the question arises, whether that act is sufficient to shew an election to take the jointure in preference to the dower, so as to bar her from claiming the dower. On the one hand, her entry upon the lands given in jointure, and receipt of the rents, have been [*347] *held to be an exercise of her right of election, sufficient to bar her subsequent claim of dower.^(p) And, on the other hand, her claim of dower, by suing out a writ for it, has been held to be a waiver of the jointure, and to be a bar to her claiming it.^(q) Whatever be the act done, however, there must have been in it a volition to elect; accordingly, in *Reynard v. Spencer*,^(r) where a husband had given his widow an annuity, in terms which the Court construed to import a gift in satisfaction of dower, and the widow had for five years received the annuity, in apparent ignorance of the existence or nature of her right to dower, Lord Langdale refused to hold that the widow had exercised the right to elect, which the 9th section of the Statute of Uses gives to her.

The Statute of Uses will receive a liberal interpretation, so as to admit a jointure, though made, not by the husband himself, (the only case for which it in terms provides,) but by the father of the husband, in contemplation of

^(m) 36, b.

⁽ⁿ⁾ 27 Hen. 8, c. 10.

^(o) *Vernon's case*, 4 Co. Rep. 2.

^(p) *Butler and Baker's case*, 3 Rep. 26 a, 3 Leon. 271; *Bushe's case*, Dyer, 220; *Vernon's case*, 4 Co. Rep. 4.

^(q) *Sharp v. Purslow*, cited 4 Rep. 4; *Gosling v. Warburton*, Cro. Eliz. 128.

^(r) 4 Beav. 107.

his marriage, or by trustees for the son, created through the medium of the father. An Anonymous case in Moor,^(s) and Ashton's case in the same reporter,^(t) which are referred to be Lord Hardwicke, in *Buckinghamshire v. Drury*,^(u) establish this doctrine.

As the terms of the 6th section of the Statute of Uses^(v) were large enough to embrace any jointure of whatever kind, limited or extensive, provided only it were made before marriage, the question was raised, in *Drury* [*348] *v. Drury*, (decided upon appeal to the House of Lords, under the title of *Buckinghamshire v. Drury*),^(w) how far the *widow could be barred from dower by a jointure made before marriage, she being then an infant, seeing that she was under an incapacity to contract. The question, however, was decided in the affirmative, and upon this ground—that the jointure takes effect, not as a matter of contract, but as a provision made by the husband, and by force of the statute making it effectual for this purpose; and that, even if it did take effect as a contract, it must in this respect follow the marriage, which the law had given the infant the power to contract; for without this, as most women previous to the statute were, and many since it have been married during infancy, an opposite decision would defeat the operation of the statute in most instances.

According, however, to the opinion of Mr. Justice Wilmot,^(x) in advising the House of Lords in the case last referred to, if there were such inadequacy in the jointure as should amount to fraud, the jointure would be void upon that ground. This part of the subject was not noticed either by Lord Hardwicke or Lord Mansfield, the Peers who took part in the judgment delivered by the House of Lords; although it is obvious, that, unless some relief of the kind were open, an illusory jointure, made while the wife was not of an age to take part in any treaty upon the subject, might bar her of a valuable dower, although the treaty had not been managed, on her part, either by parent or guardian, the persons whom Lord Hardwicke says the law presumes have done this for her; yet such relief, if it be competent, is open to all the difficulties which were pointed out by Lord Northington, in the early stage of this case: unless, indeed, they are removed, though it is not very obvious how, by the observation of Lord Hardwicke, in *Harvey v. Ashley*,^(y) where his Lordship said, "I will not say how far a mere illusory jointure might be relieved *against; but if it is not adequate to what she" [*349] would have had in dower, it is no reason to set it aside."

§ 3.—*Of the Difference between Equity and Law as to the Mode and Form required in a Jointure to make it a Bar to Dower.*

It is not necessary in equity, in order to make a jointure good, that it have been executed or perfected; for a jointure executory, or resting in covenant, will equally receive effect. Equity follows the law in the substance, though not in the mode and circumstances of the case; and, there-

(s) P. 28, pl. 91.

(u) 2 Eden, 62.

(w) 2 Eden, 60.

(y) 3 Atk. 612.

(t) P. 93, pl. 231; Dy. 228, n.

(v) 27 Hen. 8, c. 10.

(x) Wilmot, Op. 209.

fore, if that has been done which is equivalent to what the law would call a jointure, it will bind in equity.(z) But the provision must be sure and certain to take effect as a legal jointure, otherwise it will not bind the wife.(a)

Neither is it necessary that the fund out of which the jointure is made or covenanted to be made should be land. At the time at which the Statute of Uses passed, personal estate was of trifling value and inconsiderable in amount. Copyholds had hardly acquired their full strength, and trust-estates had not come into existence. Freehold estate in lands was, therefore, considered the chief kind of property, and it was the only property specified in the statute. At law, therefore, the jointure must be out of land, but it is otherwise in equity. Since the date of the statute, many other kinds of property have arisen or been created. Equity, accordingly, has modified its jurisdiction to suit those changes, and has sustained a jointure made for the wife before marriage to arise out of the Government [*350] *funds, copyholds, or trust-estates, although none of these are strictly within the terms of the Statute of Uses.(b) It is to be inferred, from the observations of Lord Hardwicke, in *Buckinghamshire v. Drury*, that a Court of equity will sustain a provision as a bar to dower not coming within the statute, whatsoever may be the nature of the property upon which it is secured, if the provision be both certain and competent. Accordingly, in *Williams v. Chitty*,(c) Lord Loughborough sustained a provision out of stock and leasehold estate, given expressly as jointure and in bar of dower, as sufficient for that purpose.(d)

In the instances which have been noticed, equity has sustained its jurisdiction to declare, that a provision made for the widow out of kinds of property not coming within the terms of the statute should be a good bar to dower. And it has likewise sustained its jurisdiction to say, that in certain cases, where such has been the agreement of the parties, a provision by the husband shall be a bar to the widow's free-bench.

The Statute of Uses is confined to dower at common law. At law, therefore, a provision made by the husband for the widow would not be a bar to her claiming her free-bench; but in equity it is otherwise. Thus, in *Walker v. Walker*,(e) the husband, by deed made before marriage, in order to make some provision for his wife, settled upon her part of his lands for her jointure, and in bar and recompense of her dower or thirds. Upon his death, the widow claimed to have her free-bench out of copyholds which had been purchased by the husband during the coverture; but the Court declared, that she was barred by the deed. And *in *Jordan v. Savage*,(f) a similar declaration was made. In *Walker v. Walker*, [*351] Lord Hardwicke said the Court proceeded by way of enforcing the agreement of parties, and to prevent double satisfaction.

(z) *Buckinghamshire v. Drury*, 2 Eden, 65; *Vizard v. Longden*, Id. 66; *Sidney v. Sidney*, 3 P. Wms. 276; *Corbet v. Corbet*, 1 S. & S. 621.

(a) *Carruthers v. Carruthers*, 4 Bro. C. C. 503; *Smith v. Smith*, 5 Ves. 188.

(b) *Davila v. Davila*, 2 Vern. 724; *Vizard v. Longden*, 2 Eden, 66; *Buckinghamshire v. Drury*, 2 Eden, 66, 67.

(c) 3 Ves. 545.

(d) See also *Rose v. Reynolds*, 1 Swanst. 446, n.; *Lacy v. Anderson*, Id. 445, n.; *Vizard v. Longden*, ubi supra.

(e) 1 Ves. sen. 54.

(f) Bac. Abr. Dower, G. 5.

As equity treats a covenant to make a jointure as equivalent to a jointure, and for that purpose sustains it against the widow, as sufficient to constitute a bar or satisfaction of dower, so, on the other hand, it will give its assistance to the widow to enforce the covenant, treating her as a purchaser of it, for the valuable consideration of marriage.(g) Equity, therefore, will, at the suit of the widow, decree payment of a jointure, or execution of a proper security for its payment, although the jointure remain upon articles for a settlement, or upon the husband's covenant. And if the husband should have covenanted that the lands settled, or to be settled, were of a certain value, equity will decree any deficiency arising, either from defect of title or of value, to be made good out of his other estate, upon which it will treat the covenant as constituting a lien;(h) and, in ascertaining what the deficiency is, the Court will take the value as at the date of the covenant,(i) and will not allow any other provision, which the husband or his bounty may have made for the wife, to be taken into account in estimating the value, or to be treated as given in satisfaction pro tanto.(k)

If there had been an outstanding term of years, which prevented the widow from enforcing recovery of her jointure, the Court, previous to the 8 & 9 Vict. c. 112, would have enjoined the heir or devisee of the husband from setting it up against her.(l)

In competition with purchasers from the husband, or with his creditors, if the jointure is secured upon specified lands, *it will be treated as [*352] creating a lien upon them, preferable according to date. If no lands are specified, then the widow will not have any preference, but will come in along with the other creditors as a specialty creditor.(m)

Should, however, a purchaser for value from the husband have vested in himself the legal estate, and have paid the price of his purchase without notice of the jointure, whereby his equity is equal with that of the jointress, equity will not, in her favour, disturb the title so acquired by him. On the other hand, if he had notice of the jointure before paying his purchase-money, equity will treat him as a trustee for the jointress, and decree him to make good the jointure.(n) For, as a general rule, a purchaser with notice is, in equity, bound to the same extent, and in the same manner, as the person was of whom he purchased.(o)

§ 4.—*The Remedies open to the Jointress under the Statute of Uses in Case of Eviction of her Jointure.*

By the 7th section of the Statute of Uses(p) it is enacted, that if any

(g) *Coventry v. Coventry*, 2 P. Wms. 221.

(h) *Probet v. Morgan*, 1 Atk. 440; *Hooke v. Grove*, 2 Eq. Ca. Ab. 219; *Glegg v. Glegg*, 4 Bro. P. C. 614.

(i) *Speake v. Speake*, 1 Vern. 217.

(k) *Hooke v. Grove*, ubi supra.

(l) *Radnor v. Rotheram*, Prec. in Ch. 65.

(m) *Fremoult v. Dedire*, 1 P. Wms. 430; *Parker v. Harvey*, 4 Bro. P. C. 604; *Carpenter v. Carpenter*, 1 Vern. 440.

(n) *Wilker v. Bodington*, 2 Vern. 599; *Crofton v. Ormsby*, 2 Sch. & Lef. 583.

(o) *Sugd. V. & P.*, Vol. 3, p. 440.

(p) 27 Hen. 8, c. 10.

woman shall be lawfully evicted from any part of her jointure by entry or action, or by discontinuance of her husband, she shall, in that case, be endowed of as much of the residue of her husband's lands whereof she was dowable as the lands of which she shall be so evicted shall amount to. No distinction is made by the statute between jointure made *before* and jointure made *during* marriage; the right exists, therefore, in both cases.(q) And, in law, it will not matter whether the wife, before marriage, accepted the jointure expressly in lieu of dower; but in equity it is *otherwise, as will be seen presently. If the other lands of the husband out of [*353] which the widow might have compensation had been sold, the right was, nevertheless, effectual to her against the purchaser.(r)

The nature of the remedy given by the 7th section of the Statute of Uses is not that the widow may have recourse to her dower out of the other lands of her husband, and reject her jointure because of partial or total eviction, but that she shall have compensation out of these lands to the extent of the eviction of the jointure, so long as that does not exceed what would have been the amount of her dower had there not been any jointure made. If, therefore, the jointure evicted exceed the dower, the compensation is limited to the dower;(s) and if the dower exceed the jointure evicted, the compensation is limited to the amount of the eviction.(t) But, although the remedy is thus limited by the statute, equity will further relieve the widow in case there should be any deficiency of the jointure, after resorting to the dower out of the other lands of the husband, by decreeing the deficiency to be made good out of his personal estate.(u)

It will not create any objection to the widow's relief, under the statute, that the eviction, where partial, took place during the coverture, and that, after her husband's death, she accepted such part of the jointure as remained after the eviction; she will, nevertheless, be entitled to compensation for the part evicted.(v)

If the jointure be merely equitable—a case to which the Statute of Uses does not apply—it would seem that a Court of equity would give the same relief as in case of eviction *from a legal jointure; for, in *Drury v. Drury*(w) Lord Hardwicke said, “If the husband had spent the [*354] equitable jointure, that would have been an eviction in equity, and, consequently, would have given the widow right to dower, like the case of an eviction at law; for equity pursues the reason of the law.”

If the wife, by antenuptial settlement, made while she was adult, accepted the jointure, and, in consideration of it, agreed to relinquish her dower, although, in case of the jointure being evicted from her, she would, under the section of the statute which has just been referred to, be entitled at law to resort to the other lands of her husband for her dower as a compensation, equity probably would restrain her from claiming it; for, being competent, at the time of accepting the settlement, to see whether a good title could be made to her jointure, she will be held to have done so, and to be bound

(q) *Gervoy's case*, Moore, 717; *Beard v. Nuttall*, 1 Vern. 427.

(r) *Mansfield's case*, Co. Litt. 33, a., n. (8).

(s) *Corbet v. Corbet*, 1 S. & Stu. 620; *Tew v. Winterton*, 3 Bro. C. C. 493.

(t) *Beard v. Nuttall*, 1 Vern. 427.

(u) *Beard v. Nuttall*, *ubi supra*; *Tew v. Winterton*, *ubi supra*.

(v) *Gervoy's case*, Moore, 717.

(w) 2 Eden, 68.

accordingly.(x) The case referred to occurred between the husband and a purchaser from him, upon a question of title. But in *Tew v. Winterton*,(y) where the question was between the widow and the creditors of the husband, and the facts were that the husband had given the wife a bond that he would convey to trustees sufficient lands to raise a specified annuity for her, and had died without making such conveyance, the Court decreed the annuity to be made good out of the personal estate of the husband, in the first place, and the deficiency, not exceeding the dower, out of his land, in the next place. These two decisions, though not upon the same facts, it must be admitted, certainly are, in some degree, opposed to each other; and therefore the question, whether equity would restrain the widow in the case suggested, must be considered as still open.

[*355] *§ 5.—*Of Jointures made under Execution of a Power in the Husband.*

Jointures are frequently granted by husbands in execution of powers given to them by the titles under which they hold their lands. The validity of the jointure, so far as that is dependent upon the fact of the instrument creating it having been made in due execution of the power, is a branch of the law which is fully treated in Sir E. Sugden's work upon Powers. The subject need not, therefore, be noticed here, further than to show the general principle upon which the Courts act in judging of the validity of such an instrument as a deed creating a jointure in execution of a power. Where a person professing to execute a power acts for valuable consideration, as upon marriage, he is understood, in equity, to engage with the person with whom he is dealing to make the instrument as effectual as he is able; and, whenever that is the case, the instrument shall have effect, so far as he has power; and where its nature is contrary to what the power prescribes, but demonstrates an intent to charge, it shall have the operation of charging in that form which the power allows. The Courts, therefore, will, in favour of the jointress, supply any defects in the mode of execution of the power. Thus, if the husband, having power as tenant for life to make a jointure of a fixed amount, covenant to make a jointure of an amount within the limit fixed by the power, and afterwards settle lands of less value, the Court will make good the deficiency as against the remainder-man out of the residue of the lands subject to the power;(a) or, if the instrument creating the jointure be made in another manner than that required by the power, it will, nevertheless, be sustained, as if it should be made *by deed instead [*356] of will,(b) or be attested by two witnesses instead of three.(c) So, if the power be so conceived that the party to execute it ought to be in possession at the time of doing so, yet, if the husband covenant that he will make the jointure when he comes into possession, should he come into pos-

(x) *Simpson v. Gutteridge*, 1 Madd. 613.

(y) 3 Bro. C. C. 492.

(a) *Tyrconnell v. Ancaster*, 2 Ves. sen. 499.

(b) *Tollet v. Tollet*, 2 P. Wms. 490.

(c) *Sergeson v. Sealey*, 2 Atk. 414; *Wade v. Paget*, 1 Bro. C. C. 367.

session, and die without making the jointure, the Court will decree this to be done by the remainder-man; (d) for where a man has a power, and, in discharge of a natural or moral obligation, shews an intention to execute it, the Court will operate upon the conscience of the heir to make him perfect the intention: and the Court will give this relief, although the covenant should be general its terms, referring neither to the power nor to the lands covered by it, if it appear from the circumstances that the power was in the contemplation of the parties, and that there were no other lands upon which the covenant could attach than those subject to the power. (e) But if the covenant be thus general in its terms, referring neither to the power nor to the lands covered by it, the covenant will not make a lien upon the land effectual against subsequent purchasers. Thus, if the husband were but tenant in tail, and, before the widow should have enforced the covenant against the remainder-man, the remainder-man should marry, and settle the lands in jointure upon his own wife, the widow could not recover her jointure as against the remainder-man. (f)

In several cases an objection has been taken to the Courts exercising their jurisdiction to supply, in favour of a jointress, defects in the execution of the power to make a jointure, that the wife was otherwise provided for; but *this objection has always been disregarded, the husband being considered the best judge of what was an adequate [*357] provision, (g) and as having shewn his opinion upon it by the execution of the power, though in a defective manner.

Other questions have arisen as to what should be the amount of the jointure, in respect of the time at which the value of the lands out of which the jointure is payable should be estimated, where the jointure has been made in execution of a power to settle lands of a specified value—whether at the time of making the jointure—at the husband's death—or from time to time—and of the burdens to which the jointure should be subject; and upon these questions conflicting decisions have been given. With regard to time, it was held, in *Tyreconnel v. Ancaster*, (h) that, in the absence of express words to the contrary, the value of the lands is to be taken, as at the time the jointure is made. There, the power was to settle lands, “not exceeding in the clear yearly value of £100 per annum for every £1000,” the husband might receive with the wife: and Lord Hardwicke held, that the value of lands was to be taken as at the time of making the jointure, and that there was not any obligation upon the remainder-man to make good that value during the continuance of the jointure estate.

With regard to the burdens to which the jointure should be subject, in the absence of any express words to the contrary, a power to settle lands of a specified “clear” yearly value will not be construed to mean such value free from all taxes or burdens whatsoever; but the jointress will be treated as coming in place of the owner of the land. The word “clear” will be construed as it would be between buyer and seller, and the jointress will be entitled to the lands as of a clear rent, according to the course of letting in

(d) *Alford v. Alford*, 1 Strang. 604; *Jackson v. Jackson*, 4 Bro. C. C. 466; *Chapman v. Gibson*, 3 Bro. C. C. 229.

(e) *Jackson v. Jackson*, *ubi supra*.

(f) *Elliott v. Hele*, 1 Vern. 406.

(g) *Tudor v. Anson*, 2 Ves. sen. 582; *Smith v. Baker*, 1 Atk. 385; *Chapman v. Gibson*, 3 Bro. C. C. 229; *Hervey v. Hervey*, 1 Atk. 567.

(h) 2 Ves. sen. 502.

[*358] the district, that is, clear of incumbrances and all other *charges, which, by the course and usage of the county in which the lands lie, ought to be borne by the tenant, but subject to the land-tax and all other out-goings, which, according to such course of the county, ought to be borne by the landlord.(i)

Where, however, the power is so expressed as to exempt the object of it from the payment of burdens, which would in the ordinary case fall upon the landlord, and, therefore, upon the jointress, as coming in his place, then the question arises as to the time at which these burdens are to be taken into account. According to the rule of construction which has just been stated, the exemption will be construed to apply to such burdens as were in existence at the time at which the power was executed, as was done by Lord Hardwicke, in *Blandford v. Marlborough*,(k) where the power was thus expressed: "Without any deduction or abatement for any taxes, charges, or impositions, imposed or to be imposed, parliamentary or otherwise." His Lordship construed the power as referring to such taxes as were in being at the time the articles by which the jointure was created, were executed, observing, that if by any accident, after the execution of the power, there should have been an excess, it would be for the benefit of the jointress; and, by parity of reason, if there should be any deficiency, she must acquiesce under it. The judgment upon the particular terms of the power was, that the jointress was entitled to her jointure, free from "all incumbrances, rent-charges, rents-secks, fee-farms, quit-rents, annuities, stipends to ministers, pensions, and procurations, payable thereout, and from all parliamentary taxes or impositions of such nature and kind as were in being at the time of executing the power, and particularly from the land-tax then in being."

The rule thus adopted by Lord Hardwicke, of fixing the date of executing the power under which the jointure was *created at the time at [*359] which the value of the lands, and the amount of the burdens to be deducted, is to be ascertained, had previously been adopted in *Speake v. Speake*,(l) decided by Lord Keeper North. But, in *Pinnell v. Hallett*, Lord Hardwicke held, that the value must be taken as at the death of the husband; and, in *Londonderry v. Wayne*,(m) Lord Henley was of opinion, that the value could not be fixed with justice but at that period, as the wife could not know the value but by inspection of the leases, or by information, if the estates were in hand.

The reason assigned by Lord Hardwicke, in *Blandford v. Marlborough*, for the conclusion to which he came in that case was, that otherwise powers of this nature would be desultory in their operation. It is, no doubt, obvious, that unless the rule be that *some* certain time is to be fixed as that at which the value is to be taken, and that being once taken, it is not again to be changed, the widow can never know in any year what she is entitled to receive, nor the heir what he is bound to pay; but this object is equally answered, whether the period adopted be the date of the settlement creating the jointure, or of the husband's death, when the jointure takes effect in

(i) *Tyrconnell v. Ancaster*, 2 Ves. sen. 502.

(k) 2 Atk. 543.

(l) 1 Vern. 217.

(m) 2 Eden, 174.

possession; and, though the cases conflict as to which of these periods is the one adopted by the Courts, it seems immaterial which it should be; for, with regard to the reason assigned by Lord Henley, in *Londonderry v. Wayne*, for choosing the death of the husband, the wife might, equally before marriage as at that time, ascertain the true value of the lands proposed to be given her in jointure. Roper has overlooked the fact, that Lord Hardwicke's judgment in *Pinnell v. Hallett* adopted the same period as Lord Henley's decision in *Londonderry v. Wayne*, viz. *the death of the husband*; and he has suggested, that the covenant by the husband—viz. that if the *lands settled should fall short of the annual value specified by the power, and adopted by the settlement, the value should [*360] be made up out of the other lands within the power—may account for the discrepancy between that case and those in which *the date of the settlement* was adopted for ascertaining the value. But, if the rule be, that the date of the settlement is the period for fixing the value, and ascertaining whether the exercise of the power exceeds or is within it, it is not very apparent how any covenant by the husband, the donee of the power, can affect the rule, or make that within the power which, but for the covenant, would exceed it. It seems impossible to avoid the conclusion upon this or any other suggestion, that *Speake v. Speake*, *Tyrconnell v. Ancaster*, and *Blandford v. Marlborough*, are in direct conflict upon this subject with *Pinnell v. Hallett* and *Londonderry v. Wayne*.

It may be observed, however, in conclusion, upon this subject, that, according to the modern practice of conveyancers, it is not usual to give a power to make a jointure by settlement of lands; the course followed being to give a power to create a rent-charge of a specified amount over specific lands, at least open to the questions which have arisen out of powers of the other description.

If the power be to give a jointure proportionate to the fortune received through the wife, any contrivance to make that fortune appear to have been larger than it really was, and so to increase the jointure, will render the jointure void as to its excess beyond the proportion corresponding to the fortune bona fide received.⁽ⁿ⁾ But, in order to justify the amount of the jointure, it is not necessary that the fortune of the wife should have been actually received by the husband to spend or to waste; it is sufficient if it have been so settled as to come for the benefit of the family. Thus, if *£8000 be paid to the husband, and £2000 be vested in trustees to enlarge the portions of younger children, this would justify a joint- [*361] ure proportioned to £10,000.^(o)

§ 6.—Of Performance of the Covenant to settle a Jointure.

In order to give the wife the benefit of her husband's covenant to settle a jointure upon her, it is not necessary that he should have made a settlement specifically in the terms of the covenant; for the Courts of equity will

(n) *Lane v. Page*, Amb. 233.

(o) *Tyrconnell v. Ancaster*, 2 Ves. sen. 500.

apply, in this case, as in others, their maxim of holding that to be done which has been covenanted to be done. Should, therefore, the husband have covenanted to settle in jointure lands of a certain value, having at the time no lands at all, and afterwards purchase lands of a nature to answer the purposes of the settlement, equity will construe this purchase to have been made in performance of the covenant, and will give the wife the benefit of the purchase, although the husband may have allowed the lands to descend upon his heir without notice of the wife's claim,^(q) and even although he may have expressly devised the lands to another party.^(r) If the husband, at the time of entering into the covenant, should be possessed of lands, and do not afterwards purchase others, there is no room for applying the equitable maxim which has been referred to, as he has not done anything which can be construed to be a performance. The covenant, therefore, will not give the wife any lien upon the lands, but it will be satisfied out of them *pari passu* with the specialty creditors of the husband.^(s) But [*362] if he should, in this case, *have also *purchased* lands, there seems no reason in principle why the maxim should not be applied as to the purchased lands. If, however, the covenant was to *purchase and settle*, then, if the husband purchased, but did not settle, the purchase will be held to have been made in performance of the covenant; and it will attach upon the purchased lands, although, at the date of the covenant, the husband may have been possessed of other lands.^(t)

The presumption of performance which is thus raised by Courts of equity may no doubt be rebutted by express evidence in the negative; but slight circumstances will not be sufficient for the purpose. Thus, if the lands or the estate in lands purchased is different from that covenanted to be settled, the presumption of performance will not arise; as, where the covenant was to purchase and settle lands of inheritance and in fee-simple, a purchase of leaseholds for lives, and reversions expectant on leaseholds for lives, was held not to answer the intent of the settlement, so as to raise the presumption of performance.^(u) So, a purchase of lands of borough-English will not stand as performance of a covenant to buy lands of fee-simple and inheritance, since the course of descent in these lands is different from the common law descent.^(v) If the settlement is to be without impeachment of waste, a purchase of copyhold estate will not satisfy the covenant.^(w) Indeed, if copyholds are not mentioned, a purchase of them will not raise a presumption of performance, as they are liable to different tenures and to forfeiture.^(x) If the covenant is so expressed as to embrace either freehold or copyhold property, it will be otherwise.^(y) On the other hand, as [*363] instances of circumstances *treated as being too slight to rebut the presumption of performance, if the covenant were to lay out so much money in the purchase of land, and lands were purchased with a

(q) *Wilcocks v. Wilcocks*, 2 Vern. 558; see also *Tubbs v. Broadwood*, 2 Russ. & My. 492.

(r) *Tooke v. Hastings*, 2 Vern. 97.

(s) *Carpenter v. Carpenter*, 1 Vern. 440; *Fremoult v. Dedire*, 1 P. Wms. 428.

(t) *Lechmere v. Carlisle*, 3 P. Wms. 212.

(u) *Lechmere v. Carlisle*, Id. 225.

(v) *Pinnell v. Hallett*, Amb. 106.

(w) *Ibid.*

(x) *Attorney v. Whorwood*, 1 Ves. sen. 541.

(y) *Wilks v. Wilks*, 5 Vin. Abr. 293, pl. 39.

smaller sum, the purchase would, nevertheless, be construed to be a performance *pro tanto*; for the covenant is not to lay out the whole in *one* purchase, and it may be that one purchase for the exact sum could not be procured.(z) So, if the covenant were to pay a certain sum to trustees, to be by them laid out in the purchase of lands, and the husband never did pay the money to the trustees, but himself purchased lands with the like sum, this will be held to have been done by him in performance of the covenant; for where a man is bound to do an act, and does that which may enable him to perform it, what he has done is taken to have been done with a view to the performance of that which he was bound to do.(zz)

If the husband should not have done any act which could be construed to be a performance of his covenant to make a settlement upon the wife, but should by will have given her certain benefits, the question will then arise whether these benefits were not intended by him to be in satisfaction, or to come in place, of performance of the covenant. Satisfaction proceeds upon presumption of an intention to give something different from the subject of the covenant as a substitute for the thing covenanted.(a) Although, for this purpose, the provision by the will may be something different from that covenanted to be settled, it must still be *ejusdem generis*. Thus, a devise of *copyhold* lands was held not to be made in satisfaction of a covenant to settle freeholds;(b) and the like decision was given where the testator had covenanted to settle on his wife an annuity of £1000, and bequeathed to *her a leasehold estate, the money to arise from a sale which he had made of real estate, and other gross sums, the net income from the [*364] whole being £550.(c) It is also necessary, to support the presumption of a gift being intended in satisfaction of a covenant to settle, that the gift, though not identical with the matter covenanted, should be of the same value; if it be of less value, it will not be treated as a satisfaction *pro tanto*, but as an independent gift over and above the covenant;(d) for, as has been already said, it is implied in the presumption of satisfaction, that an equivalent or substitute is given by the will for that which is owing by the covenant. Thus, a devise of lands and money *for life* was held not to be satisfaction of a covenant to settle lands *in fee*.(e) In this respect, there is a material difference between performance and satisfaction; for the purchase of lands of a smaller value than those covenanted to be settled may very well have been made, with an intention to purchase the remainder when an opportunity should offer, and that the smaller purchase should, in the meanwhile, be performance *pro tanto*; but, where a man is doing his last act, making his will, it is difficult to presume, that, having present to his mind what he owed by covenant, he should by gift intend to satisfy only a part of it. Of course, if the will bear *ex facie* a declaration that the gifts by it to the wife are to be taken over and above what she is entitled to under the covenant for a settlement, both the will and the covenant will take

(z) *Lechmere v. Carlisle*, 3 P. Wms. 228.

(zz) *Sowden v. Sowden*, 1 Bro. C. C. 583.

(a) *Goldsmid v. Goldsmid*, 1 Swanst. 219.

(b) *Eastwood v. Vinke*, 2 P. Wms. 614.

(c) *Broughton v. Errington*, 7 Bro. P. C. 461.

(d) *Eastwood v. Vinke*, 2 P. Wms. 614; *Broughton v. Errington*, *ubi supra*.

(e) *Alley v. Alley*, 2 Ves. sen. 37.

effect according to their terms. Thus, where a testator said, in his will, "I do hereby ratify and confirm my marriage articles, and I do also give to my wife all my lands in A. for life," Lord Hardwicke held, that the wife was entitled to take the life-estate given by the will, and also to insist on performance of the covenant *for a settlement, although the settlement [*365] was excessive in the circumstances.(f)

The doctrine of presumed satisfaction of a covenant to jointure, by gifts in the covenantor's will, is open to this observation, that, although, where a man's estate is equal only to payment of his debts, there seems good sense in applying the maxim, that he should be just before he is generous, and in imputing a gift by will in satisfaction of a debt by covenant; yet, where the estate is equal to the payment of both, there seems no reason why he should not be allowed to have been both generous and just, and why the wife should not be allowed to take what is given her by the will, and at the same time to insist upon performance of the covenant to make a settlement. However, the decisions of the Courts have ruled otherwise; but, at the same time, very eminent Judges have expressed their dissatisfaction at the rule, and have shewn their inclination to avail themselves of any thing which might enable them to get out of it.

The statute 3 & 4 Will. 4, c. 105, by putting dower completely within the control of the husband, to bar it or to allow it to take effect at his pleasure, where his marriage has taken place subsequently to the 1st of January, 1834, has rendered all such contrivances unnecessary, where the marriage was posterior to that date; but, as the old law will still operate where the marriage was anterior, it has been necessary to consider the subject.

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*§ 7.—*Of the Rights of the Jointress.*

As the widow's jointure is a new estate created in her by her husband, and not a continuation of his estate, a jointress is not entitled to the emblements upon the jointure lands at the time of her husband's death as a dowress is; but she is entitled to those upon the lands at the time of her own death, and they will either pass by her will or belong to her personal representative, as she may die testate or intestate.(g)

A jointress may grant leases of the jointure lands for years, or for her own life; and, if the lands be a manor, she is *domina pro tempore*, and may regrant them, according to the custom.(h)

If there should be incumbrances upon the jointure lands, the jointress may redeem prior incumbrances; and, in a suit for that purpose, she, and her executors after her, will be declared entitled to hold the lands until reimbursed what she may have paid for the redemption;(i) but, as between her and the heir, she will have to contribute and bear her proportion of the incumbrance, as she cannot lay the whole burden upon him.(k)

(f) *Prime v. Stebbing*, 2 Ves. sen. 409.

(g) *Fisher v. Forbes*, 9 Vin. Abr. 373, pl. 82.

(i) *Haymer v. Haymer*, 2 Vent. 343.

(k) *Carpenter v. Carpenter*, 1 Vern. 440.

(h) 1 Roper, 518.

In *Stapleton v. Conway*,^(l) Lord Hardwicke said, there had been cases where interest had been given to a jointress for a long and obstinate delay of payment and frequent demand of the money; and, in an Anonymous case,^(m) where exceptions were taken to the Master's report, for not allowing interest upon arrears of jointure, his Lordship said, the rule of the Court for allowing interest on such *arrears was not general, but the Court required a special case to be made for it; and then the Court will [*367] give interest for a reasonable time. Neither the earlier cases to which Lord Hardwicke alluded, nor any subsequent ones in which interest has been allowed upon arrears of jointure, have been discovered. Roper⁽ⁿ⁾ seems to consider a jointress, in this respect, in the same situation as a dowress; as to which see *supra*, p. 324.

CHAPTER XIV.

OF THE ASSIGNMENT OF OUTSTANDING TERMS AS A MEANS OF DEFEATING THE ESTATE OF DOWER.

THE 8 & 9 Vict. c. 112, has declared that every satisfied term of years, which should be attendant upon the inheritance or reversion of lands on the 31st December, 1845, should on that day cease, except that, if made attendant by express declaration, it should afford the same protection as if it had subsisted, but had not been assigned or dealt with; and that every term of years becoming satisfied after the 31st of December, 1845, and which by express declaration, or by construction of law, should after that day become attendant upon the inheritance or reversion of lands, should, upon its becoming so attendant, absolutely cease as to the land upon the inheritance or reversion whereof it should have become so attendant.

Nevertheless, as cases upon this subject may still arise under the old law, it is important to know the position in which a dowress would stand in regard to an outstanding *term attendant upon the inheritance [*368] of the lands whereof she is dowable, in cases to which this act, rendering assignment of outstanding terms unnecessary, would not apply.

Although at law any existing term was considered as a term in gross, it was not so in equity: there the term was viewed with reference to the purpose for which it was created. When that purpose was satisfied, the term was treated in equity as belonging to the owner of the freehold and inheritance, whether declared by the original conveyance to attend the inheritance or not; and, dower being part of the inheritance, the widow was entitled, as against the heir or devisee, to have a proportional benefit from the term,

(l) 1 Ves. sen. 427.
(n) Vol. 1, p. 519.

(m) 2 Ves. sen. 661.

corresponding to her interest in the inheritance,^(b) or to have it removed out of her way.

By the Dower Act it is declared, that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will; but, previous to that statute, if the husband had sold the lands liable in dower, the purchaser, by his conveyance, took only such estate as was in the husband, i. e., an estate subject to dower; and should there have happened to be a prior outstanding term, although the purchaser would have had the benefit of it as an accessory to the inheritance which it would accompany, he could not do so, by virtue of a mere conveyance of the inheritance, to any greater extent than he could to the inheritance. He could only do it, subject to the widow's right to a proportional interest in the term, corresponding to her interest in the inheritance, in respect of her dower.^(c) If, therefore, the purchaser had simply taken a conveyance, and done no more, he would have stood precisely in the place of the husband, his vendor; and in such a case the widow would have [*369] had the assistance of a Court of equity to restrain him *from setting up the term at law in bar of her dower, or pleading it in equity against a decree for assignment of dower.^(d) This will still be the law in all cases not falling under the Dower Act, from the circumstance of the widow having been married prior to the 1st of January, 1834.

But if the purchaser had taken, either to himself or to a trustee for him, an actual assignment of a term, created prior to the attaching of dower, and declared attendant upon the inheritance, this would have protected him against the claim for dower, although, at the time he took the assignment, he was aware that the husband, his vendor, was married, and that dower, therefore, had attached upon the subject of his purchase.^(e) As the purchaser could not, where he had notice, do this against prior incumbrancers, so as to squeeze them out, there is neither reason nor principle why he should have been able to do it against a dowress, whose estate is, in the case supposed, prior to and, both legally and equitably, as good as the purchaser's. Neither, seeing that the term attends the inheritance, in whatever form it may be moulded, is there any reason or principle why an assignment of the term, or the absence of it, should in this respect make any difference; but the rule was established, in the cases referred to, professedly neither upon reason nor principle, but because of an inveterate practice of conveyancers so understanding the law, and of the consequent danger of shaking titles by denying effect to an established mode of securing purchasers against claims of dower. For this reason the Courts went as far as the practice referred to required, but refused to go farther. Where, therefore, the purchaser had procured an assignment of an outstanding term, with notice of [*370] the vendor being married, this, in cases not coming within the *purview of the Dower Act, will protect him against the claim of dower. It is only necessary further to observe, that a mortgagee is within the rule which has been noticed in regard to purchasers; and that, although he

(b) *Maundrell v. Maundrell*, 10 Ves. 269.

(c) *Maundrell v. Eund*, 7 Ves. 579.

(d) *Maundrell v. Maundrell*, 7 Ves. 567; 10 Id. 246.

(e) *Radnor v. Vandebendy*, Show. Par. Ca. 69; *Hill v. Adams*, 2 Atk. 208, n.; *Swanock v. Lifford*, Amb. 6.

knows of the existence of a right of dower, he may advance his money to the husband, and, by taking in an outstanding term, avail himself of it to defeat the claim of dower.(f)

According to the decision in *Maundrell v. Maundrell*, if the purchaser had not obtained an assignment of the outstanding term from the trustee of it, the widow's claim of dower would prevail against him. It would seem, therefore, that the assignment must have been obtained in the life of the husband; for, assuming it not to have been done at the date of his death, and the preferable claim of dower to have thus vested in the widow, it is difficult to see how the trustee of the term could, by his voluntary act in subsequently assigning the term, displace the wife's priority of claim. But in *Hill v. Adams*,(g) Lord Hardwicke said, "If a purchaser come in after the mortgage is paid off, *and the death of the husband*, and take an assignment of the term, that would prevent dower." It has been suggested, however,(h) that the word "before" has been omitted before the words "the death;" and Preston(i) thinks, that the assignment, to be effectual, should have been completed in the life of the husband. It is no doubt true, that, in *Wynn v. Williams*, where the decision was against the dowress, the assignment had been taken subsequent to the death of the husband; but that circumstance was not considered by the Court, with a view to its effect upon the validity of the assignment.

In *Mole v. Smith*, (a case noticed in *Roper*,(k) as having occurred on the 1st of April, 1822, but not reported,) the *Court decreed the assignees, under the bankruptcy of the husband, who had died during [*371] the pendency of the suit, to concur with the widow, in whom, as administratrix of the trustee of terms to attend the inheritance, the terms had become vested, in granting to a purchaser from the assignees an assignment of the outstanding terms; upon this ground, that, if the husband had himself sold, he might have called on the trustee of the terms to assign them; and that the assignees had the same right as the husband; and the widow could not be in a better situation, because administration to the trustee of the terms had been granted to her, than she would otherwise have been.

CHAPTER XV.

OF THE BAR TO DOWER BY THE FORM OF CONVEYANCE TAKEN TO THE HUSBAND IN CASES NOT COMING UNDER THE DOWER ACT.

THE inconvenience of dower attaching upon the husband's lands has at all times engaged the attention of conveyancers, and, from time to time, forms of conveyance have been framed with a view to bar it.

The Dower Act,(a) by putting dower completely within the control of the

(f) *Wynn v. Williams*, 5 Ves. 134.

(h) Note to 1 Powell on Dev. 486.

(k) Vol. 1, p. 534.

(g) 2 Atk. 209; Co. Litt. 208, a., note.

(i) On Abstracts, Vol. 3, p. 380.

(a) 3 & 4 Will. 4, c. 105.

husband, and enabling him to bar it by a declaration to that effect in the deed originally conveying the lands to him, or by any other deed, or by his will, or generally by a devise to the widow, or to or for her benefit, of any land, or any estate or interest therein, out of which *she would be [*372] entitled to dower but for the devise, has rendered any contrivance for the purpose of barring dower unnecessary, where the marriage took place subsequently to the 1st of January, 1834; but as the old law will still operate, where the marriage was anterior to that date, it is still necessary to consider what that law was.

According to the old law, if the husband intended before marriage to bar the widow's dower, he might have conveyed his lands to trustees, and the conveyance would have had the effect of barring the dower, though the trust should have been for the husband himself and his heirs simply; (b) but if the conveyance had been made, not in the legitimate exercise of the husband's right openly to prevent dower taking effect, but with concealment from the intended wife, and with other symptoms of an intention to disappoint her reasonable expectation of the provision of dower, which the law would make for her, there was no principle in reason or justice why this fraud of the husband should have been allowed to succeed, any more than a similar attempt of the wife to defeat the husband's right as tenant by the curtesy. Accordingly, Gilbert, C. B., says, (c) "If the husband, seised in fee just before the marriage, should put the legal estate into the hands of trustees, to disappoint the wife of her dower, such a conveyance would be reckoned fraudulent, because that conveyance was made with an ill conscience and an evil intent to deprive the wife of the provision made for her by the common law."

To this effect, also, was the decision of the Court in *Radnor v. Vandebendy*, (d) and in *Bateman v. Bateman*. (e)

In short, as the law existed even prior to the Dower Act, the husband, if so minded, might, before marriage, have prevented *dower attaching upon his estate by conveying it to trustees; but if the mode of his doing so had discovered an intention of fraud and concealment against the wife, upon the authorities as well as upon principle, dower would have attached, notwithstanding the conveyance.

Supposing any imputation of fraud upon the legal rights which would flow to the wife from subsequent marriage, if nothing had been done by the husband, before marriage, to prevent these rights as to dower taking effect to be out of the question, let us now consider the means which were generally adopted, prior to the Dower Act, to defeat the right of dower by the mode in which the title of the husband was framed.

In the forms contrived by conveyancers, the object was to shape the conveyance of lands to the husband so as that an estate in them, such as dower would attach upon, should not vest in the husband, and that he should, nevertheless, have, as near as possible, the complete dominion of the fee. The first contrivance adopted was to make a limitation creating a joint tenancy in the husband and a trustee, because, as has been seen, (f) the widow

(b) *Bottomly v. Fairfax*, Pre. in Ch. 336; Lord Hardwicke obiter in *Hill v. Adams*, as his judgment is given in a note to Co. Litt. 208, a.

(c) *Lex Pretoria*, p. 267.

(e) 2 Vern. 436.

(d) *Show. Par. Ca.* 71.

(f) *Vide ante*, p. 269.

of a joint tenant is not entitled to dower; but that form was attended with this hazard, that if the husband survived the trustee, then the tenancy was at an end, and the entire seisin became vested in the husband, and thereupon dower would attach. Upon discovery of this defect, the next method fallen upon was to continue the joint tenancy, but to give the legal inheritance to the trustee in trust for the husband, so that the husband should not be seised of more than a trust of the inheritance, an estate upon which dower does not attach; (g) but this form exposed the husband to the risk of the trustee dying without an heir, and of the estate thereby escheating, or of his heir being an incapacitated person and difficulties in obtaining a proper conveyance thereby arising, or of the trustee so framing his *will as to make it doubtful whether the trust-estate did not pass by it, and [*374] thereby rendering legal proceedings necessary in order to clear off the doubt. The view of these objections led to the adoption of a form of limitation by which the estate was taken "to such uses as the husband should appoint, and, until appointment, to the use of himself and his heirs," or to the use of the purchaser for life, and, after his death, to such "uses as he should appoint, and, for want of appointment, to the use of his heirs." The effect of this form of limitation, as enabling the husband, by execution of the power of appointment, to defeat the right to dower, was at one time much doubted, upon these grounds that the law would not allow the husband, after the right to dower had attached, to defeat it by an act of his own doing, and destroy a title which the law had created; and that the power was, moreover, liable to be defeated by an act of the husband, in which case dower thenceforth would attach. But these doubts were subsequently overruled. (h) Another mode was, to give the husband only a trust-estate for his life, to vest the legal freehold *pur autre vie* in a trustee, and to give a remainder in fee to the use of the husband; in which case the two estates given to the husband, not being of the same kind, could not unite in him so as to give him seisin of the inheritance upon which dower could attach. By either of these modes complete control over the inheritance was reserved to the husband; and, if he died intestate, the legal inheritance would descend to his heir.

In process of time, the different forms of limitation which have been mentioned gave place to that which was finally adopted, and is still to be used, since the Dower Act, in cases not falling within the operation of that statute, viz. to give the husband a remainder in fee, expectant upon an estate for life in himself, and interpose between the two estates a freehold estate *pur autre vie* in a trustee, so as to prevent *the union of the life-estate and the remainder, and the existence of such a seisin in the husband as would give a right to dower, the whole being preceded by a power of appointment enabling him to dispose of the estate in the most convenient mode. [*375]

(g) Vide ante, p. 260.

(h) 2 Sugd. Powers, 34, 6th ed.

CHAPTER XVI.

OF THE MODE, PRIOR TO THE DOWER ACT, OF BARRING DOWER AFTER
MARRIAGE BY CONVEYANCE OF HUSBAND AND WIFE.

SUPPOSING a husband, married prior to the 1st of January, 1834, not to have adopted the means which were open to him *before* marriage, for the purpose of barring the dower of his after-taken wife, it remains still to be considered how he could, *after* marriage, deal with lands discharged of the right of dower which had attached upon them.

The Fines and Recoveries Act^(a) has abolished these modes of conveyance from the 31st of December, 1833; but at an early period of the law, while these forms were in use, it was considered that a wife could not bar her right of dower by joining her husband in the levying of a fine, because, until his death, her title was not consummate; yet, ever since Lampet's case,^(b) it was well established that she might pass her interest by joining her husband either in a fine or a recovery, and that this effect would be the necessary consequence of such concurrence, as she had no other right in the lands which she could have intended to affect by joining with him. But the extent to which her interest passed depended, both at law and in equity, upon

[*376] *the purpose for which the fine was levied or the recovery suffered. Thus, as is put in Lampet's case, if the husband and wife had granted a rent out of the lands by fine, or made a lease for years, reserving rent to the husband and his heirs, should the wife afterwards have recovered dower, she would have held it charged with the rent or the term, as the case might have been; for, beyond these purposes, and in the absence of any more extensive declaration of the uses of the fine or recovery, the use reverted to the husband in fee, and in his hands became subject to dower. Therefore, by joining her husband in levying a fine for a limited object appearing *ex facie* of the declaration of uses, the right of dower was not further disturbed than was necessary for satisfaction of that object. But if the declaration of the uses of the fine or recovery had been so extensive as to import an absolute grant of the fee at law, it must have received this effect, and the dower have been absolutely barred; but if the fine, though thus absolute, had in truth been intended for a limited purpose, as to confirm a mortgage in equity, the effect given to it would have been so limited.^(c)

It was no objection to the validity of the fine, as against the wife, that, although she concurred with the husband in levying it, she did not do so in the deed to declare the uses, which was executed by him alone, provided the declaration was according to the intent with which the fine had been levied.^(d) Nay, if the deed to declare the uses had been executed prior to the levying of the fine, and by the husband alone, the fine would have bound the wife according to the uses so declared, upon the presumption, that, when

(a) 3 & 4 Will. 4, c. 74.

(b) 10 Co. Rep. 49.

(c) Dolin v. Coltman, 1 Vern. 294; Anon., 2 Eq. Ca. Abr. 385; Jackson v. Parker, Amb. 687.

(d) Swanton v. Raven, 3 Atk. 105; Beckwith's case, 2 Co. Rep. 57.

she concurred in the fine with her husband, she concurred in the uses he had declared, so long, at least, as the contrary was not made to appear.(e)

*In order, however, to bind the wife, it was necessary that the fine should, in the husband's lifetime, have been completed, to the [*377] paying of the king's silver; for it was only a fine levied that could bind the wife, and one incomplete was not a fine.(f) If the proceedings had been incomplete at the time of the husband's death, the widow might have stopped her further concurrence, and defeated the proceedings, so far as they had been had in his lifetime.(g)

There are several early cases, in which, where the husband had either expressly covenanted that his wife would concur with him in levying a fine, or done that which implied a covenant to that effect, the Courts of equity decreed him to procure her concurrence.(h) But these decisions occurred at a period when the effects of disability from coverture were not so well ascertained, nor the jurisdiction of the Courts of equity, in decreeing specific performance of agreements, so well understood, as they are at the present day. Where the husband did not allege his wife's refusal to concur, there could not be any reasonable objection to such decrees being made. How far they could have been enforced, consistently with the admitted principles of the law, seems very doubtful, if the wife, in the event, had actually refused her concurrence in the course of the proceeding. The policy of the law is, that the rights of the wife in real estate cannot be aliened without her free and voluntary consent, judicially taken; and the judge is not to allow her to do the act, unless without compulsion; and, as the husband had no power over her to compel her concurrence in the fine, except by using that influence over her from which it is the policy of the law to protect her, it *is difficult to see how such decrees could have been enforced with- [*378] out the Court making itself a party to compel a breach of its own rules, or doing that which it never does—decreeing a man to do what he himself has no power to do, and no right by law to require another to do.

The policy of such a decree, and the power of the Courts to make it, was questioned by Lord Cowper, in *Otread v. Round*,(i) where he refused to make it, notwithstanding the precedents cited to him; and the same result occurred in *Bryan v. Woolley*,(k) though upon what ground does not appear; and *Gilbert, C. B.*,(l) likewise questions whether the Courts would make such a decree, because of the necessary result of compulsion upon the wife to do that which the law says must be voluntary. It is no answer to say, that the wife agreed to give her concurrence, for no agreement can bind a woman under coverture.

The opposition of such decrees to policy, and the absurdity of the position in which the Court might be placed if called upon to enforce them, was forcibly pointed out in *Emery v. Wase*;(m) and the observations in that case were referred to by Sir Thomas Plumer, M. R., in *Martin v. Mitchell*,(n) as having very much weakened the authority of the cases in which

(e) Beckwith's case, ubi supra.

(f) 1 Roll. Abr. 375, pl. 20.

(g) *Hody v. Nunn*, 1 Roll. Abr. 375, pl. 20.

(h) *Hall v. Hardy*, 3 P. Wms. 187; *Barrington v. Horn*, 2 Eq. Ca. Abr. 17; *Withers v. Pinchard*, cited 7 Ves. 475; *Morris v. Stevenson*, 7 Ves. 474.

(i) 4 Vin. Abr. 203.

(k) 1 Bro. Par. Ca. 184.

(l) *Lex Pretoria*, 245.

(m) 8 Ves. 514.

(n) 2 J. & W. 426.

these decrees had been made, notwithstanding Lord Eldon, in *Jackson v. Innes*,^(o) had entertained the possibility of the Court decreeing the husband to procure his wife to join with him in levying a fine.

The 3rd section of 3 & 4 Will. 4, c. 74, declares, that "persons, liable to levy a fine, or to procure another to levy a fine, under a covenant entered into prior to the 31st of December, 1833, shall be liable to make or procure such a disposition to be made under the act as will effect all the purposes intended to be effected by the fine." It is *possible, therefore, that [*379] questions of the kind we have been considering may still arise upon covenants entered into prior to the 31st of December, 1833; and, when they do arise, the difficulties pointed out by Lord Eldon, in the way of decreeing a husband to procure his wife to concur with him in levying a fine, which, as to her, should be a voluntary act, and which are equally applicable to decreeing him to procure her to concur with him in making a disposition under the statute, will receive that effect which Lord Eldon was not called upon, and which, with his usual caution, he did not give them in *Emery v. Wade*, inasmuch as he was able to support the decree upon other grounds. The only course apparently for the Court to take in such a case, consistently with its own principles, is, as suggested by Jacob,^(p) either to leave the covenantee to recover damages at law from the husband, or to rescind the contract, and impose upon the husband such terms of compensation as the circumstances of the case may make reasonable, as was done in *Sedgwick v. Hargrave*.^(q)

With a view to the *possibility of such cases* as have been mentioned *occurring*, it may be useful to notice here, that, in *Jordan v. Jones*,^(r) Lord Cottenham discharged an order, which had been made upon a married woman, to execute a conveyance, under the Act for the Abolition of Fines and Recoveries,^(s) in pursuance of a decree of the Court to that effect, as not being within the power of the Court.

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*CHAPTER XVII.

OF THE BAR TO DOWER BY THE HUSBAND'S FINE WITH PROCLAMATIONS.

PREVIOUS to the Statute for the Abolition of Fines and Recoveries,^(a) and to the Dower Act,^(b) although the wife's right to dower could not be consummate until the death of the husband, it was nevertheless in his power to bar the right by levying a fine with proclamations, by himself alone; for then 4 Hen. 7, c. 24, declared all fines, levied with proclamations, should conclude all parties interested, unless they brought their action within five

(o) 16 Ves. 367.

(q) 2 Ves. sen. 57. See, on this subject, a note by Mr. Jacob, to 1 Roper, 545.

(r) 2 Ph. 170.

(s) 3 & 4 Will. 4, c. 74.

(p) 1 Roper, 548, n.

(s) 3 & 4 Will. 4, c. 74.

(b) Id. c. 105.

years after the proclamations made, but reserved to women coverte to bring their action until five years after they should become discoverte; and this statute, contrary to the doctrine in Plowden,(c) has been construed to include the right of the wife to dower, and to bar it if she did not bring her action to recover dower within five years of the husband's death.

Should any fine with proclamations have been levied prior to the 31st of December, 1833, by a husband, the widow will be entitled to her dower, should she sue for it within five years of her husband's death, unless, indeed, she should happen to be at that time within age, in prison, abroad, or not of sound mind; in any of which cases her action is saved, by the statute of Hen. 7, for five years after the disability shall have been removed.(d) In *Menvill's case*,(e) the husband had died while under attain for treason. *After more than five years had elapsed from the time of his death, his heir procured a reversal of the attainder, where- [*381] upon his widow sued for her dower and obtained it; the Court holding, that, as she had no right to dower while the attainder was in force, her right of action did not accrue until the reversal of the attainder, and was therefore saved by the provision in the statute reserving such right of action as should first come to her, after the proclamations made, by virtue of any cause made *before* the fine was levied, provided the action were brought within the five years after the right to it accrued. The statute, however, requires that action be taken, or the right pursued, within five years; and it has been held, that this was not satisfied by merely suing out of a writ of dower, without doing more, within the five years.(f)

CHAPTER XVIII.

OF THE BAR TO DOWER BY THE TREASON OF THE HUSBAND.

By the 5 & 6 Edw. 6, c. 11, s. 13, (repealing 1 Edw. 6, c. 12, and thereby restoring the common law in this respect,) the attainder of the husband for treason or petty treason will operate as forfeiture of the widow's dower, the 7 Anne, c. 21, and 17 Geo. 2, c. 39, having in this respect been both repealed by 39 Geo. 3, c. 93; but the husband's attainder and conviction, or outlawry, for murder or felony, will not operate to forfeit the dower, the 1 Edw. 6 declaring, that they should not have this effect, and, in this respect, *altering the common law as it had previously existed.(b) [*382] It must be remembered, however, that conviction of treason will not produce a forfeiture, unless the conviction has been followed by judgment; so

(c) Plow. Com. 373, a.

(d) *Bingham's case*, 2 Co. Rep. 93; *Seymour's case*, 10 Co. Rep. 99; *Menvill's case*, 13 Co. Rep. 20.

(e) *Ubi supra*.

(f) *Fitzhugh's case*, 3 Leon. 221.

(g) *Fitz. Nat. Brev.* 150, 151; *Perk. sect.* 308. 387.

that the dower would be saved by the death of the husband in the interval between conviction and judgment.(b)

As attainder for treason corrupts the blood and prevents any one from claiming through the party attainted, the effect of the attainder, so long as it is not reversed, will be to bar the widow from dower, not only out of the lands of which the husband may have been seised at the time of the attainder, but also out of those which he may have aliened prior to the treason and during the coverture; and this consequence will not be removed by a pardon being granted to the husband, for that extends only to his life, not to the attainder.(c) If, however, the husband acquire any lands *after* the date of the pardon, dower will attach upon them; for the husband, by the pardon, becomes a new man, capable of acquiring and communicating rights; and the issue which he might have had subsequent to the pardon being inheritable, the widow's right of dower will accrue.(d) But if the husband, or his heir after him, should be able to procure a reversal of the attainder for error, or if Parliament should reverse the attainder, the effect being to restore the husband's blood, and put him in the same position as if the attainder had never passed, the necessary consequence is to revive the right to dower in lands acquired as well *before* as *after* such proceeding.(e)

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*CHAPTER XIX.

OF THE BAR TO DOWER BY ACTS OF THE WIFE.

THE right to dower may be barred not only by acts of the husband, but of the wife, during the coverture. Thus, if she be attainted of treason, murder, or felony, she will forfeit her right to dower,(a) unless she obtain a charter of pardon during the husband's lifetime. If she obtain a pardon, her right will revive; for, although a pardon to the husband for his treason would not, from a peculiarity in the feudal tenure, revive his seisin, so as to entitle the widow to dower, the attainder estopping the claim of any interest through him, that reason does not exist where the husband's seisin remains intact, and the bar has arisen from the wife's own attainder. In the latter case, the attainder operates as a bar while it lasts, but, being removed, the right accruing through the seisin of the husband revives, and is capable of being consummate by his death.(b)

If the wife elope from her husband with another man, the law will presume that she is living with the man in adultery, and, under the Statute of Westminster the Second,(c) she will forfeit her dower, unless there

(b) Co. Litt. 390, b., 391.

(d) Co. Litt. 392; Perk. sect. 387.

(e) Perk. sect. 349.

(c) 13 Ed. 1, c. 34.

(c) Mayne's case, 1 Leon. 3.

(e) Menvill's case, 13 Co. Rep. 19.

(b) Co. Litt. 33; Gib. Ten. 204.

should be a voluntary reconciliation between her and her husband.(d) This will be the case, although she should not remain with the adulterer, or although she should do so against her will.(e) It is not necessary, however, for the operation of the statute, that the wife should have gone away from her husband with the adulterer, or that she should have been *convicted of the crime of adultery, as a precise reading of the statute might give room to infer; for it is not the manner of her going [*384] away that is the cause of the bar, but her remaining away in adultery.(f) It will be sufficient, therefore, howsoever she may have gone away, that she voluntarily continues away, living in adultery.(g) Should there be a reconciliation with the husband, she will be entitled to dower, not only of such lands as the husband was possessed of or acquired after the reconciliation, but of such as he possessed prior to, or acquired during, the elopement.(h)

If a fine have been levied by a married woman alone, prior to the 31st December, 1833, subject to the observations which have been already made as to the validity of such a fine, the effect of it will be to bar her right to dower.(i)

The widow may, after the death of her husband, do acts which will operate as a bar or a satisfaction of dower, as by accepting an assignment of dower *against* common right, which will bar her from claiming dower *according* to common right;(k) or by accepting any interest out of the lands whereof she is dowable, the enjoyment of which is inconsistent with the title to dower, as if she accept from her husband's heir a lease for life,(l) or for years,(m) of the lands of which she is dowable; for she cannot claim the dower against herself.

The widow may also bar her dower by a release, although granted, not to the tenant of the freehold, but to a party entitled to the reversion; for the right arises both out of the freehold and the reversion.(n)

*CHAPTER XX.

[*385]

OF THE BAR TO WIDOW'S FREEBENCH OUT OF COPYHOLD LANDS.

THE Dower Act(a) does not embrace copyhold lands in its provisions; the law, therefore, is the same as it was previously to that statute, in regard to the power of the husband to bar the wife's right to freebench out of such lands. As before observed, in the absence of any special custom to the contrary, it has always been necessary, in order to entitle the widow to free-

(d) Co. Litt. 32, b.; 2 Inst. 436; Perk. sect. 354.

(e) Perk. sect. 354.

(g) Hetherington v. Graham, 6 Bing. 135.

(h) Co. Litt. 33, n. 8; Menvill's case, 13 Co. Rep. 23.

(i) Portington's case, 10 Co. Rep. 43.

(k) Vide ante, p. 285.

(m) Gilb. Dower, 391; Fitz. Nat. Brev. 140, E.

(n) Co. Litt. 265, b.

(f) 2 Inst. 434.

(l) Perk. sect. 350.

(a) 3 & 4 Will. 4, c. 105.

bench, that the seisin of the husband, in the lands out of which the freebench is claimed, should have continued in him up to the period of his death. In this way it was always, even prior to the Dower Act, and, of course, still is, in the power of the husband to bar the widow's right to freebench by alienation of the land, to take effect in his own lifetime; and for this purpose a surrender is sufficient, although the surrenderee may not have been admitted prior to the husband's death; for, notwithstanding the death, it is still in the surrenderee's power to perfect the alienation, by admission upon the surrender; and when he does so, the admission has relation back to the date of the surrender, i. e. to a date anterior to the husband's death, and thereby divests that seisin in his lifetime, which it is necessary should have continued in him until his death, in order to support the right to freebench; for although the title to freebench was intercepted by the marriage, and might have been consummate *by* the death, and the surrenderee's title was not consummate till *after* the death; yet the incoep-
 [*386] tion **was* but conditional upon the husband dying seised, and the condition not having been purified, the title could never be consummate; whereas the title of the surrenderee, incepted by the surrender, had nothing to prevent its being consummate, though after the death. (*p*)

As was shewn above, (*q*) a contract by the husband to sell his copyholds, or a covenant to surrender them for valuable consideration, as it makes his possession that only of a trustee for the purchaser or covenantee, will defeat the freebench.

If the tenure by copyhold be destroyed, as if the lord enfeoff the husband, copyholder in fee, and he die thus seised, this will operate to destroy the freebench; (*r*) but a conveyance by the lord, of the freehold and inheritance to third parties, with a remainder to the husband, if the remainder do not vest in possession in the husband prior to his death, so as to extinguish the copyhold tenure, will not defeat the freebench; for the husband died a copyholder, notwithstanding his right to the remainder. (*s*)

If, according to the custom, the widow is entitled to freebench not only out of such copyholds as the husband died seised of, but such as he was seised of at any time during the coverture, a surrender by the wife alone, in the lifetime of her husband, after having been privately examined, will operate as her fine in similar circumstances in regard to dower of freehold lands would have done, and will bar her right to freebench. (*t*)

(*p*) *Benson v. Scott*, 3 Lev. 385; *Holdfast v. Clapham*, 1 T. R. 600.

(*q*) *Vide ante*, p. 260.

(*r*) *Lashmer v. Avery*, Cro. Jac. 126.

(*s*) *Waldoe v. Bertlet*, Cro. Jac. 573; *Howard v. Bartlet*, Hob. 181.

(*t*) *Wood v. Lambirth*, 1 Ph. 8.

*CHAPTER XXI.

[*387]

OF THE EFFECT OF ALIENATION BY THE DOWRESS OF THE LANDS
WHEREOF SHE IS ENDOWED.

THOUGH such a thing is not likely to occur in the present day, yet in ancient times it would appear that widows had occasionally affected to deal with the lands of their husband, which they possessed merely in right of their dower or by way of jointure, as if the inheritance itself were in them, instead of a mere life-estate. In such cases, if the conveyance had been made with a warranty, the warranty would have bound the heir, ^(a) upon a presumption of law that he had received a recompense in lands. ^(b) But the statute of 6 Edw. 1, c. 7, following soon after a similar provision in regard to conveyances by tenants by the curtesy, declared that, if a woman should sell or give in fee, or for term of life, the land that she held in dower, the heir, or other to whom the land should revert after her death, might demand the land by writ of entry in Chancery.

This statute was followed by the 11 Hen. 7, c. 20, which enacted, that, if a woman, having an estate in dower, or for life, or in tail, jointly with her husband, or only to herself or to her use, in lands of the inheritance or purchase of her husband, or given to the husband and wife in tail or for life, by any ancestor of the husband, or by any other person seised to the use of the husband or of his ancestors, should either sell, or with an after-taken husband alien the same, the alienation should be void, and it should be lawful for the person, to whom the inheritance of the lands after her *decease would belong, to enter and enjoy the lands, as if no such [*388] alienation had been made, to the exclusion of the woman thenceforth, and as if she had been dead; provided, that, if she were married at the time of the alienation, she might, after the death of her husband, re-enter to the lands, and enjoy them of her first estate, with a general exception where the heir concurred in the alienation.

Another proviso in the act saved to the woman the right of conveying the lands for the term of her own life only; limiting, therefore, its operation to defeating conveyances for a larger estate than the grantor had in herself.

These statutes were followed by the 4th of Anne, c. 16, which in its 21st section declared that all warranties by any tenant for life of lands, the same descending or coming to any person in reversion or remainder, should be void.

These statutes, being remedial, and not penal, receive a liberal construction for the heir; therefore, although the words in the 11th Hen. 7, are, "any woman who hath had, or hereafter shall have, *any estate in dower*," it is not necessary, in order to avoid her conveyance, that her dower should have been actually assigned to her previously to the date of the conveyance;

(a) Co. Litt. 365.

(b) Gilb. Ten. 135.

for in *Barker v. Taylor*,^(c) it was held, that, if a woman, having a title to dower, entered and levied a fine before she was endowed, the fine would be within the act.

So also the statute has been construed to embrace modern trusts, for it especially includes lands limited to the use of the wife; and uses at that period (prior to the Statute of Uses) were the same as trusts now are.^(d)

As to the particular lands which the statute of Hen. 7 is intended to protect from alienation, they are, in the terms of the statute, lands of the inheritance or purchase of the *husband, or given to the husband [^{*389}] and wife in tail, or for term of life, by any of the ancestors of the husband, or by any person seised to the use of the husband, or of his ancestors. But the remedy of the statute will not be defeated, if the lands, though neither coming directly from the husband or his ancestors, or one seised to his or their use, in truth come by the provision of the husband. Thus, in *Lynch v. Spencer*,^(e) the husband enfeoffed a third party of his lands, upon condition that he should re-grant them to the husband and wife in tail, which was accordingly done, and a lease for life, granted by the wife after the husband's death, was held to be void under the statute, as the gift by the feoffee was by the provision of the husband.

On the other hand, although the lands come directly from the husband or his ancestor, if in truth the whole, or a part only, came originally from the wife, they will not fall within the statute, as to such part as came from the wife. In *The Queen v. Savage*,^(f) the husband's father, *before* the marriage, gave the lands in fee to the husband and the intended wife, and *after* the coverture they levied a fine of the whole to the father, who afterwards granted the lands to the husband and wife in tail; and it was held, that only the moiety, which the husband gave by the fine to his father, fell within the statute, and that the other moiety, which the wife held in her own right, and had granted to the father, could not be considered as coming by the grant of the father from the husband's ancestor, within the meaning of the statute; and in *Laughter v. Humphrey*,^(g) where the husband and wife were joint-tenants of the lands *before* marriage, and afterwards levied a fine of the whole to a stranger, who rendered to them again in tail, the Court held that only one moiety fell within the statute. Yet a case is mentioned *by Coke,^(h) where a man, seised of lands in right of his wife, [^{*390}] joined with her in levying a fine of them, and afterwards the conusee granted the lands to the husband and wife in special tail, with remainder to the right heirs of the wife; after the death of the husband, leaving issue, the wife again married, and joined her second husband in levying a fine of the lands, and the Court held that the heir might enter, the case being within the statute.

In *Sharrington v. Crawford*,⁽ⁱ⁾ it was held, that a gift of lands from the husband's *brother* to the husband and wife, for their lives, came within the statute, as a gift from an *ancestor* of the husband.

(c) 2 Leon. 168.

(d) *Clifton v. Jackson*, 2 Vern. 489; *Symson v. Turner*, 1 Eq. Ca. Abr. 220.

(e) Cro. Eliz. 513.

(f) *Moore*, 715; *Eyestone v. Studda*, Plowd. 463.

(g) Cro. Eliz. 524.

(i) Plow. 600, 607.

(h) Co. Litt. 366, a.

Following out the principle of liberal construction which has been adverted to, the Courts have held, that lands were not the less the gift of the ancestor of the husband, so as to fall within the statute, that, in addition to marriage, money may have been given by the wife or her friends, as a consideration for the settlement made upon her. *(k)* So, also, lands have been held to be of the purchase of the husband, so as to come within the statute, although they may have come from a stranger, in consideration of money paid, not by the husband alone, but by him in conjunction with the friends of the wife. *(l)*

But where the lands came from the wife or her ancestor, and the husband paid a sum of money for the settlement, it was held, that he did not thereby become a purchaser of the lands, so as to bring them within the terms of the statute, as being lands of the purchase of the husband; for, although payment of the money was part of the cause, marriage and advancement of the wife was by intentment the principal cause. *(m)*

*But where the lands came neither from the husband nor the wife, nor the ancestors of either, but from a stranger, upon a recital of [*391] good service by the husband, and divers other considerations not specified, they were held not to come within the statute, as the consideration of the services of the husband was not such a purchase as the law intends, but the gift was voluntary, and the other considerations, not being named, could not alter the case; *(n)* whence it may be inferred, that, in order to make the husband a purchaser within the intent of the statute where the lands come from a stranger, the lands must have been granted to him for a valuable consideration.

Copyhold lands, so long as they continue of that tenure, do not fall within the statute, because a right of entry is given by it to the party whom the widow's conveyance is intended to prejudice, which in copyhold cannot be, without the admission of the lord. *(o)* But if the tenure be extinguished, and the lands, being thus turned to freehold, are thereafter settled in jointure upon the wife, they will come within the statute. *(p)*

The remedy which the statute had in view was the protection of the husband and his heirs against the alienation of the wife. If the settlement, by its form, shew that no regard was had by the husband to the interest of his heirs in particular, the case, though within the letter, will not be treated as within the spirit of the statute. Accordingly, where lands were devised *to a wife in tail, remainder to a stranger*, and the widow aliened the land, there being no issue of the husband to inherit the estate tail, it was held, that, although the case was directly within the words of the statute, which went to all estates, in tail or for life, of the lands of the husband, yet it was not within **the intent*, which was only of lands given for the advancement of the wife; but the devise could not be intended to be a [*392] jointure, as no inheritance was reserved to the baron or his heirs. *(q)* But

(k) Moore, 93; Villers v. Beaumont, Dy. 146, a.

(l) Piggott v. Palmer, Moo. 250.

(m) Kynaston v. Lloyd, Cro. Jac. 624; Copland v. Pyatt, Cro. Car. 244.

(n) Ward v. Walthew, Cro. Jac. 173.

(o) Gilb. Ten. 181; Harrington v. Smith, Sid. 41, 73.

(p) Stockbridge's case, Cro. Eliz. 24.

(q) Foster v. Pitfall, Cro. Eliz. 2.

if the estate tail general be followed by a remainder to the husband and his heirs, then the statute will have application to prevent the wife's alienation.^(r) In *Gretton v. Haward*,^(s) where the judgment was given by a certificate returned to Chancery, without any reason assigned, it was argued that the statute did not apply to devises where the gift by the husband was to take effect after his death, nor to other than conveyances from the husband to the wife, which a devise was not. But the terms of the statute are sufficient to embrace a devise, and the decision in *Foster v. Pitfall*^(t) was upon a devise, and no doubt was suggested, that, if its terms had been different, the statute would have applied, though the gift was by devise.

In an early case mentioned by Coke,^(u) it was held, where the husband joined the wife in levying a fine of lands, which he had previously settled upon himself for life, remainder to the use of the wife and the heirs male of her body by him begotten for her jointure, that the issue might enter after the husband's death, the case being within the intention of the statute. But in *Kirkman v. Thompson*,^(v) this decision was overruled, and for this obvious reason, that the conveyance struck at by the statute is by any woman being sole, or with an after-taken husband; whereas the woman was not sole, nor was the husband who joined *after-taken*, but the husband who provided the lands; and the object of the statute was, to prevent the disinheritation of the heirs of that husband contrary to his wish.

[*393] *Although the words of the statute are, "alien, discontinue, release or confirm with warranty," the words "with warranty," are not applicable to each of these modes of alienation, but only to "release" and "confirm," which, without a warranty, are not a bar or discontinuance. If, therefore, the other modes of alienation, without a warranty, are adopted the case will nevertheless be within the statute. Thus, in *Lynch v. Spencer*,^(w) a lease by the widow for the life of the lessee was held to be a discontinuance within the statute; nay, further, the Court, in carrying out the intention of the statute, have held, that a lease for a long term of years after a fine levied by the widow, as a lease for a hundred years, was an alienation within the statute; otherwise, the object of it might be entirely defeated.

It must be observed, that the alienations by the widow are not absolutely void *ab initio*; no such declaration is made by the statute: all that it declares is, that the person to whom the inheritance would belong, if she were dead, may enter to the lands; till he enters, the deed by which the alienation was accomplished remains valid, not only as to such person, but as to all other persons.

This right of entry is not confined to the heir of the husband, but is open to every person to whom the inheritance would go after the death of the widow, whether he be the heir, or one deriving title through him, if the inheritance has actually passed, such as the conusee in a fine levied by the heir, while seised of a remainder in fee expectant upon an estate tail in the widow;^(x) for the effect of the fine is to bar not only the conusor, but the

(r) *Symson v. Turner*, 1 Eq. Ca. Abr. 220.

(s) *Ubi supra*.

(t) *Cro. Jac.* 474.

(u) *Brown's case*, 4 Co. Rep. 50;

(w) *Cro. Eliz.* 513; 3 Co. Rep. 50.

(x) *Ward v. Mathew, Noy*, 122.

(e) 6 Taunt. 94.

(a) Co. Litt. 365, b.

right of entry of the issue in tail, and to transfer it to the conusee. If, however, the right of the person deriving title from the heir can take effect only by way of estoppel, he cannot enter to defeat *the widow's alienation; as, if the conveyance from the heir had been by lease [*394] and release, the releasee could not enter, for the release would not operate as any bar to the entry of the issue of the releasor; or if the issue, not being seised of any remainder, but having only *a right* to the entail, were to levy a fine, and thereafter the widow should alien, as the fine could not pass any estate to the conusee, and could operate only by way of estoppel, the conusee could not, for this reason, enter, neither could the conusor, for as to him the fine would be operative as a bar.(y)

As the statute expressly saves alienations, where the heir next inheritable to the widow, or the person that next after her death would have the inheritance, has assented to them, if the tenant in tail in remainder expectant upon the widow's estate for life join with her in levying a fine, or suffering a recovery, the estate tail will be effectually barred, and all right of entry under the statute destroyed; or if the deed of the wife is to confirm a recovery suffered by the heir, the statute will operate to void her deed.(z)

CHAPTER XXII.

OF THE BAR OF DOWER BY THE ACTS OF THIRD PARTIES.

ALTHOUGH the widow may have a good general title to dower, her right to it out of any particular property, which would otherwise be subject to dower, may in some cases be excluded, either by a right given by law to the heir of the husband to elect whether he will treat the property as real or *personal inheritance, or by a right given by the husband to third parties in regard to the purchase of the property. Thus, a rent-charge is *primâ facie* subject to dower; and if the husband have not in his lifetime either made distress and avowed in a court of record, whereby the land would be charged and the person of the grantor discharged, and the rent be treated as real estate, or if the husband have not sued out a writ of annuity against the grantor, whereby the rent would be treated as personal estate,(a) it is open to the heir of the husband, in his stead, to take either of these courses, and the right of the widow to dower will depend upon which of them he may elect to follow. If the heir distrain for the rent, and avow in a court of record, the widow will be entitled to dower; if, on the other hand, he sue out a writ of annuity, the dower will be barred.(b) So, if the husband be one of several partners in trade, who have purchased

(y) *Lincoln's case*, 3 Co. Rep. 61.

(z) *Lincoln's case*, 3 Co. Rep. 60; *Curtis v. Price*, 12 Ves. 97.

(a) *Litt. sect. 219*; *Co. Litt. 144*.

(b) *Co. Litt. 144*.

land for the purpose of the trade, and who by their deed of partnership have power, in case of the death of any of their number, to purchase his share of the land, the husband's share, upon the election of his surviving partners to purchase, will descend as personal estate to his executors,(c) to the necessary exclusion of the widow's claim to dower; or if the husband before marriage demise land, with a power to the tenant to purchase it within a given time, should the husband die within the time, and the tenant thereafter exercise the power, in the succession to the husband's estate the money will come in place of the land, and will go to his executor, to the exclusion of the heir; and this election by the tenant will bar the widow's right to dower.(d)

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BOOK VII.

OF THE INTEREST WHICH HUSBAND AND WIFE TAKE IN PROPERTY FROM THE LEGAL EFFECT GIVEN TO PARTICULAR TERMS OF GIFT OR LIMITATIONS OF PROPERTY.

CHAPTER I.

OF THE INTEREST WHICH HUSBAND AND WIFE TAKE IN PROPERTY THE SUBJECT OF GIFT OR DEVISE TO THEM, OR TO THIRD PARTIES IN CONJUNCTION WITH THEM.

If a gift or devise of land be made to husband and wife, in such terms as, if the gifts were to persons strangers to each other, would create a joint tenancy, or give to each a moiety, with the incident of survivorship, and a right to sever the jointure during the tenancy, the effect of such a gift or devise to husband and wife will be, to give them a right by entireties, and not by moieties; for the two being by law one person, they cannot take separate estates; and the effect will be the same, whether the gift be in possession, reversion, or remainder. Being thus seised, per tout, and not per my et per tout, the husband cannot alien, during the coverture: the whole estate, therefore, will go to the survivor.(a) For the same reason the

(c) *Ripley v. Waterhouse*, 7 Ves. 435; *Thornton v. Dixon*, 3 Bro. C. C. 198.

(p) *Townley v. Bedwell*, 14 Ves. 590.

(a) *Back v. Andrew*, 2 Vern. 120; *Green v. King*, 2 H. Bl. 1211; *Doe v. Parratt*, 5 T. R. 652.

attainder of the husband will not work a forfeiture of the land. The whole, in such case, will go to the wife.

*What *quantity* husband and wife will take, as between them and third parties, where the gift is to them along with other persons, [*397] will depend, as it seems, upon the particular terms of the gift in each case. According to Littleton, (b) where a gift is made of a joint estate to husband and wife, and to a third person, the husband and wife take but as much between them as the third person; but, in the cases which have occurred, it would rather seem that the Courts have proceeded upon the particular terms of the gift in each case; (c) and in this Coke seems to agree with them, in that passage of his comment upon the section of Littleton alluded to, where he says, that, "if a gift be made to A. for life, to husband in tail, and to wife for years, each will take a third in respect of the severalty of their estates." For the same reason, if a feoffment with warranty had been made to a man, and a feme sole and their heirs, and they had thereafter married, and, after marriage, they should have been impleaded, and had vouched and recovered in value, as at the time of recovery they were husband and wife, they would have taken in entireties, and not in moieties. So, also, if livery of seisin, *secundum formam chartæ*, were not made under a charter to a man and woman and their heirs until after their marriage. So, also, if under a grant of a reversion attornment were not made to them until after their marriage. (d).

CHAPTER II.*

[*398]

OF THE LEGAL EFFECT OF REQUESTS TO "NEXT OF KIN," ETC., AS REGARDS THE RIGHT OF HUSBAND OR WIFE TO TAKE UNDER THEM.

§ 1.—Of the Right of the Wife under Gift to "Next of Kin," &c. of the Husband.

MARRIAGE will not give the wife, where she survives the husband, money or other property bequeathed to his "next of kin;" for she does not come within this description, in its ordinary sense, which applies only to those related by *blood*; and, in the Statute of Distributions, which refers to kindred blood, (a) the widow and next of kin are put in opposition. To entitle her to take under a bequest to "next of kin," there must be something in

(b) Sect. 291.

(c) *Bricker v. Whalley*, 1 Vern. 233; *Warrington v. Warrington*, 2 Hare, 54.

(d) Co. Litt. 187, b.

(a) *Worseley v. Johnson*, 3 Atk. 761.

the context of the will shewing an intention to include her among those who strictly are alone entitled to take as next of kin.(b)

Neither will the widow have a right to take where the bequest is to "the relations" of the husband. "Relation" is a term which, taken generally, will include any kind of connexion, but in common parlance is used to express relation by blood.(c) Because of its uncertainty, the Courts, at an early period, determined that its meaning should be confined to such relations as were within the Statute of Distributions.(d) Accordingly, where [*399] the widow has claimed as coming within the term, for the reason already assigned as excluding her where the gift is to "next of kin," she has likewise been excluded where it is to "relations," she and the next of kin being put in opposition to each other by the statute.(e) Still more obviously must this be the case where the bequest is to relations, with an express reference to the statute.(f)

Where the husband's estate is bequeathed or otherwise given to his "legal personal representative," of course the widow will take if she happens at the time to be his legal representative; but whether she will do so beneficially, or only in trust for others, will depend, as will afterwards be noticed,(g) in regard to the same question with respect to the husband, upon the construction to be put upon the instrument under which she takes—a matter which is foreign to the object of this treatise.

§ 2.—*Of the Right of the Husband under Gift to "Next of Kin," &c., of the Wife.*

Where it is necessary for the husband, after the death of the wife, to have administration to enable him to get in her personal property, not reduced by him into possession during the coverture, what he takes in this way is not in a representative character, but jure mariti, in his own right as husband; and yet an admission of liability for a debt contracted dum sola, made during coverture, will be receivable against the husband suing as her administrator.(h) No right to this administration is given by the statute to [*400] the husband: it is assumed as being already in him. The expression, therefore, used sometimes, that the husband is entitled to administration, as the next of kin to the wife, is an inaccuracy. The husband is not of kin to the wife, nor she of kin to him. If, therefore, the husband survive the wife, he will not be entitled to claim, in that character, personal estate which may have been either bequeathed to or settled upon her "next of kin." Accordingly, where property was settled upon the wife for life, and after her death according to her appointment, and in default of appointment for her "next of kin," Lord Loughborough held, that this description

(b) *Nichols v. Savage*, cited 18 Ves. 52; *Garrick v. Camden*, 14 Ves. 382.

(c) *Davies v. Bailey*, 1 Ves. sen. 84.

(d) *Thomas v. Hole*, Ca. temp. Talb. 251; *Withorn v. Harris*, 2 Ves. sen. 527.

(e) *Green v. Howard*, 1 Bro. C. C. 30; *Rayner v. Mowbray*, 3 Id. 234.

(f) *Worseley v. Johnson*, 3 Atk. 757; *Davies v. Bailey*, 1 Ves. sen. 84.

(g) Vide *infra*, p. 400.

(h) *Humphry v. Boyce*, 1 Moo. & Rob. 140.

could in no respect apply to the husband.(i) In this opinion Lord Eldon concurred, in *Garriek v. Camden*;(k) observing, at the same time, that the Court would look through the will to see whether an intention was manifested to include him among those who are to be taken more strictly as next of kin.

Several cases have occurred, raising questions whether the husband was entitled to take under gifts or bequests to the "legal representative," "personal representative" of the wife, and the like; but these cases have been decided according to what was supposed to have been the intention in the use of the particular phrase, as discoverable from the context of the instrument, according to the principle recognised in the construction of wills and settlements, and not upon any principles properly belonging to the subject of this treatise. It may, however, be observed, that, where money is given by will, or settled upon the wife, with a power of appointment, and in default of appointment, to the "executors, administrators, or assigns," or "executors or administrators" of the wife, these expressions, in the absence of any intention to the contrary manifestly apparent from the instrument, will receive their ordinary construction. *According to that construction, they do not apply to "next of kin."(l) The [*401] persons, therefore, answering the description of executors or administrators take in their representative character (unless the contrary is apparent),(m) and then the fund is to be applied and administered in the same manner as any other assets that "come to them in that character."(n) The effect of this construction, therefore, is to give the fund to the husband; for, being property of the wife come to her executors in their representative capacity, without any further disposition of it by the instrument under which it comes to them, the husband will be entitled to receive it *jure mariti*.

*BOOK VIII.

[*402]

OF THE POWER OF A MARRIED WOMAN TO MAKE A WILL.

THIS subject is very fully noticed by Mr. Justice Williams in his work upon Executors;(a) but as this Treatise would not be complete without some mention of it, it cannot be altogether omitted. A short notice, however, will be sufficient.

(i) *Watt v. Watt*, 3 Ves. 246.

(k) 14 Ves. 382.

(l) *Graffety v. Humpage*, 1 Bea. 46; *Daniel v. Dudley*, 1 Ph. 1; *Holloway v. Clarkson*, 2 Hare, 521.(m) *Wallis v. Taylor*, 8 Sim. 244; *Meryon v. Collett*, 8 Bea. 392.(n) *Daniel v. Dudley*, 1 Ph. 1.

(a) 1 Williams on Executors, 43.

The incapacity of a married woman to devise her lands by reason of her special exception by the 14th sect. of the 34 & 35 Hen. 8, c. 5, has been already mentioned. With regard to her personal chattels, these, by the marriage, belong absolutely to the husband; and as to her chattels real, the husband may dispose of them during the coverture, and is entitled to take them to his own use, if he survive the wife: her will, therefore, cannot affect either of these rights of the husband, and, accordingly, is treated as a nullity, and is not admitted to probate, unless it have been made with the express consent of the husband.^(b) One exception, however, to this exists in the case of the Queen Consort, who may dispose of her chattels by will without the consent of the King.^(c)

Consent of the husband is not necessary to a will by the wife of property which she holds as executrix or administratrix of another,^(d) to the effect of passing the right of representation to her testator or intestate.^(e)

[*403] Where the will of a married woman professes to be made *with the assent of the husband, it must be shewn that the assent had reference to that particular will; for proof of assent in general, without reference to any will in particular, will not be sufficient;^(f) and the assent should be given at the time of proving the will,^(g) for the husband may revoke it at any time before actual probate.^(h)

If the husband predecease the wife, a will made by her with his consent will be void against her next of kin, so far as its validity depended on that consent, and will not pass property bequeathed to her during the coverture,⁽ⁱ⁾ and still less will it pass any property acquired by her after her husband's death.^(gg)

If a widow recognise in any way, however informal, a will which had been made by her dum sola or during coverture, and not falling within the Wills Act,^(hh) that will set it up.⁽ⁱ⁾

Where property is given to or settled upon a married woman to her separate use, as she is, in regard to this property, viewed as a feme sole, she may dispose of it by her will without the assent of her husband,^(k) whether the property be in possession or reversion.^(l)

If the husband be banished by act of Parliament, then, as the wife may in every other respect act as a feme sole, so she may in respect of making a will.^(m)

The Wills Act⁽ⁿ⁾ declares, that every will made by a woman subsequent to the 1st January, 1838, shall be revoked by her marriage, except where [404] the will is made in *execution of a power of appointment, and, in default of it, the property would not pass to her heir, or executor, or next of kin.

(b) *Steadman v. Powell*, 1 Add. 58; *Bransby v. Haines*, 1 Ca. temp. Lee, 120.

(c) 2 Black. Com. 498.

(d) *Scammell v. Wilkinson*, 2 East, 552.

(e) *Hodsdon v. Lloyd*, 2 Bro. C. C. 534, 543.

(f) *Roe v. Butterworth*, 2 Strang. 891.

(g) *Henley v. Phillips*, 2 Atk. 49.

(h) 1 Swin., pt. 2, sect. 9.

(i) *Stevens v. Bagwell*, 15 Ves. 156.

(gg) *Scammell v. Wilkinson*, 2 East, 556.

(hh) 1 Vict. c. 26.

(i) *Miller v. Brown*, 2 Hagg. 209; *Braham v. Burchell*, 3 Add. 264.

(k) *Fettyplace v. Georges*, 1 Ves. jun. 46.

(l) *Sturgis v. Corps*, 13 Ves. 190; *Henden v. Rosher*, 1 M'L. & Y. 89.

(m) *Portland v. Frogers*, 2 Vern. 104; *Compton v. Collinson*, 2 Bro. C. C. 385.

(n) 1 Vict. c. 16.

Previous to the Wills Act, the will of a woman was revoked by her subsequent marriage; and, therefore, a will made prior to the 1st of January, 1838, would be revoked by subsequent marriage, without the aid of the statute. But if the wife should survive the husband, the will would revive, according to Plowden;^(o) but this was negatived in Lewis's case.^(p)

The Wills Act excepts from revocation by marriage a will made by a woman *after* the 1st of January, 1838, in execution of a power of appointment, when, in default of the execution, the property would not pass to her heir or next of kin. This, in truth, assumed that such a will, made *prior* to the Wills Act, would not be revoked by subsequent marriage; and it was so decided in *Logan v. Bell*.^(q)

PART II.

RIGHTS AND LIABILITIES ARISING TO HUSBAND AND WIFE, FROM CONTRACT OR GIFT.

BOOK I.

SETTLEMENTS BY THE HUSBAND UPON THE WIFE, MADE PRIOR TO MARRIAGE.

*CHAPTER I.

[*405]

CASES IN WHICH THE SETTLEMENT IS TREATED AS THE PRICE PAID BY THE HUSBAND FOR THE WIFE'S PROPERTY.

MARRIAGE, as has been seen, is a gift to the husband of the wife's personal estate and her chattels real, but qualified, in regard to both her choses

(o) Com. 343, a.

(p) 4 Burn. 51; 2 Bro. C. C. 554.

(q) 14 Com. Pleas Cas. 372.

en action and her chattels real, by its being necessary for him, as to the choses en action, to reduce them into possession, and, as to the chattels real, to do some act of appropriation during the coverture; and, if the estate is contingent or reversionary, the gift is further liable to be defeated by the contingency not occurring, or the reversion not falling into possession during the coverture; in either of which cases the wife surviving will take. If, however, the estate of the wife is made the subject of settlement, the husband may in this way acquire an absolute unqualified right to it, whatever [*406] be its nature. This he may do by settlement made *prior to, and in contemplation of, marriage, or by settlement made at any time after the marriage has been celebrated.

If the wife was an infant at the date of a settlement made before marriage, the effect of the settlement upon her property will depend upon the nature of that property. If the property be real, the settlement will not be binding as to the wife, unless there be issue of the marriage, having an interest in it under the settlement, for they are purchasers both from father and mother, and therefore the property must be bound; and the only way in which the property could be set free, would be by act of Parliament; (a) unless, indeed, after the husband's death, the wife had taken the benefit given by the settlement; for then, upon the doctrine of election, she would be bound by the equity arising from her own act. (b) But the settlement will be binding upon the husband, so as to prevent his doing any act which would defeat it, as by his making a mortgage in fee. (c)

On the other hand, if the property be personal, the settlement will be binding on the wife, notwithstanding her infancy at its date; for, even if her parent or guardian could not contract for her, so as to bind the property, (which, from *Drury v. Buckinghamshire*, (d) it appears he can do,) the property becomes the husband's immediately upon the marriage, (e) and therefore is subject to his covenants in the articles for a settlement. (f) But if the estate in the property were contingent or reversionary, and such as would not become the husband's unless reduced into possession during the coverture, if the wife should survive him *the settlement will not bind [*407] the property against her right to take by survivorship. (g)

According to the doctrine laid down in an old case, (*Blois v. Hereford*), (i) the husband would be entitled to the wife's estate, provided he had made an equivalent settlement upon her, although there should not have been any express contract between them to that effect, the law in such a case *presuming* an agreement that the wife should not have both her own fortune and the jointure given to her by the husband. That doctrine has since been entirely overruled. If the settlement, made by the husband upon the wife, is altogether silent as to her estate, the circumstance of his having made the settlement will not constitute him a purchaser of her estate, whatever may be the proportion between the value of that estate and the benefit

(a) *Harvey v. Ashley*, 3 Atk. 612; *Milner v. Harewood*, 18 Ves. 275.

(b) *Durnford v. Lane*, 1 Bro. C. C. 111.

(c) *Ibid.* 106.

(d) 2 Eden, 60.

(e) *Harvey v. Ashley*, ubi supra; *Trollope v. Linton*, 1 S. & S. 485.

(f) *Williams v. Williams*, 1 Bro. C. C. 153.

(g) *Bush v. Dalway*, 1 Ves. sen. 20; 3 Atk. 530.

(i) 2 Vern. 501.

given by the settlement.(k) "The husband's making the settlement does not vest in him the choses en action of the wife, unless it be expressly so agreed, and that appears to be part of the consideration of the settlement.(l) In order to make the husband a purchaser of the wife's fortune, the settlement must either express that it is made in consideration of the fortune, or the contents of it must altogether import that, and plainly, as much as if it were expressed."(m)

On the other hand, if the terms of the settlement shew that it was intended by it to give the wife's property to the husband, the absence of any pecuniary advantage flowing from him will not be a bar to his taking the advantage which the settlement was intended to give him. Nay, if the husband do not by the settlement give any actual estate to the wife, but only renounce in her favour the exercise of *his marital rights in regard to her property, that of itself will be a sufficient considera- [*408] tion.(n)

The law, then, being, that, in order to entitle the husband to the wife's estate, by virtue of a settlement made prior to marriage, the settlement must shew that this was intended by it, nice questions have arisen, in regard to what is to be considered such mention of the fortune by the settlement as will constitute the husband a purchaser of it. In *Heaton v. Hassell*,(o) the settlement made by the husband was expressed to be "in consideration of a considerable fortune and portion;" yet the wife surviving was decreed to be entitled to a bond, which had been granted to her before the coverture, and which had not been got in during it. But in *Adams v. Cole*,(p) where the settlement contained a recital that the wife's "fortune amounted to about £500," the residuary legatee of the husband was decreed, as against the representative of the wife, who had survived the husband, to be entitled to a bond to the wife, similar to that in *Heaton v. Hassell*. It seems difficult to say, that in the one of these cases the mention of the wife's estate was more express than in the other, or that any specific portion of the estate was the consideration for the settlement in the one case more than in the other. The only way in which it is possible to reconcile the apparent discrepancy between the cases, is by supposing that Lord Talbot, in *Adams v. Cole*, considered the fact in that case of the husband not having brought any fortune, and, at the same time, having made specific provisions by the settlement upon the wife, as shewing that the fortune of the wife was the fund out of which these provisions were to come, and that, therefore, the entire fortune, whatever it might be, was the subject-matter of the settlement.

*Where the property in question arose under a covenant by a third party, which formed one of the considerations for the settle- [*409] ment, but was so framed that it might have been performed in favour of the wife or her children, to the exclusion of the husband, the fact of the husband having allowed the covenant to be so framed was treated as evi-

(k) *Salwey v. Salwey*, Amb. 692; *Druce v. Dennison*, 6 Ves. 385.

(l) *Heaton v. Hassell*, 4 Vin. Abr. 40, pl. 11.

(m) *Druce v. Dennison*, ubi supra.

(o) 4 Vin. Abr. 40, pl. 11.

(n) *Adams v. Cole*, Forr. 168.

(p) *Ca. temp. Talb.* 168.

dence to shew that he had not, in all events, purchased the benefit of the covenant, and it was therefore decreed to belong to the wife surviving. (q)

If any specific part of the wife's estate has been the subject of agreement by the settlement, the remaining part will continue the property of the wife; for, as to it, the agreement, being silent, affords no evidence that the husband contracted for it. Thus, in *Cleland v. Cleland*, (r) where £100, part of a bond for £300, payable to the wife, was given to the father of the husband, in consideration of his settling upon the wife a farm, in which he had a life-estate, and the husband a tenancy in fee, the wife surviving was decreed to be entitled to the remaining £200 of the bond, unless there were an agreement that the husband should have it, as to which an inquiry was directed; and in *Burdon v. Dean*, (s) where, of £1000, held in trust for the wife, £500 was given to the husband, and the remaining £500 was settled upon the wife and the children of the marriage, and the settlement was silent as to any other estate of the wife, Sir R. P. Arden, M. R., held, that the settlement did not bar the wife as to the rest of her estate.

The extent to which the Court carries the rule of requiring evidence from the settlement of an intention that the husband should be purchaser of any particular part of the wife's property, is further illustrated by the case of *Corbie v. Free*. (t) There the settlement recited that the wife had [*410] £1500 already in possession, and a vested interest "in an eighth share of the real estate and residuary personal estate of a testator, amounting to £32,000 and upwards; and, in consideration of the £1500, and also of the vested interest of the value of £4000 and upwards, the husband covenanted to pay £4000 to the trustees of the settlement, after his decease, in trust for the wife, on condition only that there should be sufficient assets for doing so after payment of all his debts. The value of the reversionary interest turned out to be 5842*l.* 10*s.* The assignees in bankruptcy claimed payment of this sum, without performance of the covenant in the settlement as to the £4000. Lord Cottenham, C., said, "If it were necessary to come to any conclusion upon the terms of the settlement, it would be very difficult to shew, on the face of it, evidence of an intention that the husband should become purchaser of that future expectant interest; on the contrary, I think the true construction would be the other way." But his Lordship held it to be unnecessary to decide that question, because the assignees, at all events, could only take the reversionary interest, after satisfying the covenant. That conclusion is subject to this observation, that, after satisfying the covenant, there remained a sum of 1842*l.* 10*s.*, which the judgment did not dispose of; for it belonged to the wife or to the assignee, according as the husband was or was not a purchaser of the reversionary interest.

In the cases which have hitherto been noticed, the question that arose was, whether the settlement made the husband a purchaser of the fortune that had already accrued to the wife at the time of the marriage. Where the property in dispute has accrued to the wife subsequently to the marriage, the same principle will prevail in determining whether the husband has become a purchaser of it, as regulates the question whether he has become

(q) *Garforth v. Bradley*, 2 Ves. sen. 675.
(s) 2 Ves. jun. 607.

(r) Pre. in Chanc. 63.
(t) Cr. & Ph. 64.

a purchaser of previously-acquired property. The cases in which this has been decided have arisen between the wife and the creditors of the husband. In these, if the husband had become a *purchaser of the after-acquired property, his assignees in bankruptcy were absolutely entitled to it; [*411] if, on the other hand, he had not become a purchaser, they could only take subject to the wife's equity to a settlement out of the property.

The first case in which the question as to after-acquired property occurred was *Elibank v. Montolieu*,^(u) where the question arose with an individual creditor of the husband seeking to retain the property of the wife, acquired subsequently to marriage, in payment of the husband's debt, discharged of any claim by the wife for a settlement, in respect that a settlement had been made upon her prior to marriage; but Lord Loughborough, being of opinion that the provision upon marriage was made upon expectation that, by circumstances to occur in the family, there would be an opportunity to do better for the wife at a future time, declared, that the after-acquired property was subject to a further provision in her favour. In *Mitford v. Mitford*,^(v) the settlement was not distinctly stated in the pleadings; but Sir W. Grant, M. R., said, it appeared to have been made in consideration of the wife's fortune, as specified and described in the deed itself: so the husband could not be considered a purchaser of any thing more than the fortune she then had; and he decreed a legacy afterwards given to the wife, which had not been got in during the coverture, to belong to the wife surviving, as against the assignees in bankruptcy of the husband. In *Carr v. Taylor*,^(w) the settlement was in consideration of the portion or fortune which the husband would have or receive upon the marriage. Sir W. Grant said, the rule is established, that, to make the husband a purchaser of the whole, the settlement must either express or clearly import that intention. The meaning of this settlement seemed to be, that the husband should take only what was to become his immediately upon the marriage; and he decreed the assignees in bankruptcy of the husband to make *a settlement upon the wife out of a share of residuary estate to which she [*412] had become entitled during the coverture.

The cases, then, upon this subject establish the following propositions:—

1. That if the settlement, although it give benefits from the husband to the wife, be silent in regard to her property, the husband will not take it as purchaser.

2. If the settlement deal only with a part of the wife's property, and is silent as to the rest, the husband will not take the residue as purchaser.

3. A mere recital of the existence of the personal property in the wife will not show that the husband was intended to be purchaser of it; but it will be otherwise if the recital be so expressed as to show that the parties intended to deal with the property as a consideration for the benefits given by the husband, and to do so specifically as their knowledge of the property enabled them.

4. If the consideration for the settlement be, in terms, the whole property of the wife, but the statement of the property is so limited as to embrace only what existed at the date of the settlement, the husband will not be

(u) 5 Ves. 737.

(v) 9 Id. 95.

(w) 10 Id. 574.

entitled to property which may have accrued to the wife subsequently to that date.

Supposing the terms of the settlement to be such as will entitle the husband to take as a purchaser, then he and all claiming under him will take absolutely as against the wife, without being subject to any claim by her for a further settlement out of the property taken. If, on the other hand, the terms of the settlement are such as will not entitle the husband to take as a purchaser, and his title is *jure mariti* alone, then he and those claiming under him will take, subject to the wife's equity for a settlement or her right by survivorship, according to the nature of the property—subjects which have been treated of elsewhere.(x)

[*413]

*CHAPTER II.

WHETHER DELIVERY OF THE WIFE'S PROPERTY, PURCHASED BY THE HUSBAND'S SETTLEMENT, IS POSTPONED UNTIL PERFORMANCE OF HIS COVENANTS IN THE SETTLEMENT.

WHERE the consideration given by the husband for the property of the wife rests upon covenant only, neither he nor those claiming in his right will be entitled to have the property without first performing the covenant; provided always, that the right to reduce the property into possession being immediate, the performance of the covenant is not by its terms contingent upon an event or a period not yet arrived, or which may never arrive during the coverture. Thus, in *Holt v. Holt*,(a) by the settlement upon marriage, the husband covenanted to settle upon the wife a jointure of £100 a year for every £1000 to which the wife should become entitled under the will of a third party. After the death of the husband, his creditors claimed to have the wife's rights under the will, as purchased by the husband; but Lord King, C., decreed them to belong to the wife, as, by the death of the husband, without making a settlement according to the covenant, she could not have the recompense in consideration whereof she had agreed to part with her rights under the will. In *Pyke v. Pyke*,(b) the husband by the settlement agreed to make a settlement of lands by way of jointure upon the wife, and that her portion should remain in the hands of trustees until the settlement should be made. After the death of the husband, without his having made the settlement, the wife, being entitled to a *share of her father's residuary estate, claimed it as her own by survivorship, against the children of the marriage, who claimed as purchasers under the settlement: and Lord Hardwicke decreed, that, as no settlement had been made, or could be made, pursuant to the intent of the articles, the legal right which the wife had by surviving her husband ought to prevail, as

(x) Vide ante, pp. 51 et seq., and 113 et seq.

(a) 2 P. Wms. 647.

(b) 1 Ves. sen. 376.

there was no instance, where the wife's portion was in her own hands, of the Court taking it from her, unless she had what was stipulated for. In *Mitford v. Mitford*,^(c) the husband, in consideration of the fortune of the wife, had covenanted by settlement upon marriage to pay to trustees for the wife £6000, by instalments, within twelve years from the date of the marriage. The husband became bankrupt before his covenant had been performed, and the trustees of the settlement were allowed to prove under the bankruptcy for only £3000, the amount of the instalments then due. Afterwards the assignees in the bankruptcy claimed to have a reversionary interest of the wife, which came into possession after the bankruptcy, as having been purchased by the husband by the settlement. But Sir W. Grant, M. R., said, that while the obligation of the husband remained unperformed, as he thought it was, to the extent of £3000, neither he nor any person claiming under him could be permitted to receive the wife's fortune upon any other condition than that of making good the settlement. In *Corsbie v. Free*,^(d) the husband, in consideration of a vested reversionary interest in the wife of the value of £4000 and upwards, covenanted to pay, immediately after his death, to trustees for the wife, the sum of £4000. Upon the death of the husband, in bankrupt circumstances, Lord Cottenham declared, that the assignees of the husband could not take the reversionary interest without paying the £4000 in the husband's covenant.^(e)

*If the right to receive the wife's property is immediate, while, on the other hand, the performance of the covenant by the husband [^{*415}] in her favour is postponed to a period, or till the occurrence of an event, which has not arrived, the husband, if the settlement make him a purchaser, will be entitled to take the property, his right to which has become absolute in the case supposed, without regard to performance of the covenant, which is future and contingent; although, from intervening bankruptcy or insolvency, there may be every probability that, when the time for performance of the covenant does arrive, he will not be able to make it. In *Bassevi v. Serra*,^(f) the husband had covenanted, that, in case he should receive any money to which the wife should become entitled under the will of H. A., his heirs or executors should, within six months after his death, pay to the wife or her executors a sum proportioned to what he might so have received. The wife, during the life of the husband, became entitled, under the will of H. A., to a sum of Long Annuities, which the assignees of the husband in bankruptcy claimed, as purchased by the settlement, and Sir W. Grant so decreed. His Honor said, "If the time for performing the covenant had arrived, the Court would not let the husband get hold of the property, leaving the covenant unperformed; but, unfortunately, the wife had accepted a covenant which was not to be performed till after the husband's death, and in the event of her surviving him: his right had become absolute; hers was future and contingent."

Corsbie v. Free,^(g) which has been already noticed, was a case of the same kind. There the covenant by the husband was, that in consideration of the conveyance to him of a vested reversionary interest, expectant on the

(c) 9 Ves. 87.

(d) Cr. & Ph. 64.

(e) See observations upon this case, *postea*, p. 415.

(f) 14 Ves. 318; 3 Mer. 674.

(g) Cr. & Ph. 64.

death of a tenant for life, to which the wife was entitled, along with other parties, under a will, the husband, his heirs or executors, should, immediately *after his death, pay £4000 to the trustees of the settlement, [*416] in trust for the wife, in case she should survive him. In 1815 the husband became a bankrupt. In 1819, by the death of the tenant for life, the reversionary estate became divisible among the different parties entitled. In 1837, the wife's share, amounting to £5842*l.* 10*s.* was paid by the executor of the will to the assignee of the husband in bankruptcy, to be held by him without prejudice to any equity which the wife was, "before such payment, entitled to," and in the same manner as if it had continued with the executor. Shortly afterwards the husband died, and then a bill was filed by the widow against the assignee, for payment of the 5842*l.* 10*s.* Lord Cottenham, C., declared, that the wife was entitled to have the 5842*l.* 10*s.* applied in satisfaction of the unperformed covenant by the husband for payment of the £4000. Inasmuch as the 5842*l.* 10*s.* became payable to the wife in the life of the husband, and performance of his covenant for payment of the £4000 was postponed by the settlement until immediately after his death, this decision of Lord Cottenham is upon the facts apparently in conflict with that of *Bassevi v. Serra*; but, evidently, it was not so intended, for in the course of the argument, when *Bassevi v. Serra* was mentioned, his Lordship observed, "In that case the husband was still living, and might yet perform his covenant, and the Court would not presume that he would not do so;" and again, in noticing the same case in his judgment, his Lordship says, "In that case the husband was alive, and his covenant was to take effect only upon his death." Lord Cottenham, therefore, did not dissent from *Bassevi v. Serra*, but he seemed to be under the impression, that in *Corsbie v. Free* the husband was dead, whereas he was alive at the time when the 5842*l.* 10*s.* was paid to the assignee in the husband's bankruptcy, and the covenant, as in *Bassevi v. Serra*, was to be performed after his death. Either his Lordship was under a misapprehension as to the [*417] *facts, or else he must have considered, that, under the terms of the payment by the executor of the will to the assignee, the assignee was in the place of the executor, or suspended the right to the £5, and the intervening death of the husband, while as yet the right of the wife to the money had not been adjudicated upon, put her right to performance of the covenant for payment of the £4000 into the same condition as the right of the husband or his assignee to receive the 5842*l.* 10*s.* If this suggestion, as to Lord Cottenham's view of the facts in *Corsbie v. Free*, be correct, and should the words of Sir W. Grant, in *Bassevi v. Serra*, "If the time for performing the covenant had arrived, the Court would not let him get hold of the property, leaving his covenant unperformed," be construed to mean, if the time had arrived at the date of the decree, the decisions in *Bassevi v. Serra* and *Corsbie v. Free* may be reconciled. But it is difficult to suppose that Lord Cottenham took the view of the facts in *Corsbie v. Free* which has been suggested; for the right of the assignee to the 5842*l.* 10*s.* became vested on the death of the tenant for life, and the money should therefore have been then paid by the executor to the assignee unconditionally, and by him have been divided among the husband's creditors. If this had been done, it could hardly be stated even, that upon the death of the husband, however shortly afterwards, the money

could have been recovered back from the creditors. It is not very apparent, then, what was the difference which the condition, annexed by the executor to his payment to the assignee, that it was subject to the equities of the wife, could make upon the right of the creditors, more especially when it is remarked, that the condition had regard to the equities of the wife before the payment. At all events, however difficult it may be to reconcile what Lord Cottenham *did* in *Corsbie v. Free*, with Sir W. Grant's decision in *Bassevi v. Serra*, there is nothing in what he *said* which *betrays the least dissent from that decision, but the reverse; and, therefore, the [*418] doctrine before stated may be repeated, that where the right to receive the property of the wife, purchased by the husband's settlement, is immediate, and the covenant given by him as the consideration is future and contingent, the husband will be entitled to take the property, without regard to the probability or improbability of his being able to perform the covenant when the time for performance shall arrive.

CHAPTER III.

OF THE HUSBAND'S COVENANT BEFORE MARRIAGE TO SETTLE A SUM UPON THE WIFE, OR LEAVE OR PAY HER A SUM AT HIS DEATH.

LET us now consider the construction which has been put upon the husband's executory covenants, in regard to the interest which the wife shall take in his personal estate at the termination of the coverture.

If before marriage the husband covenant to settle upon the wife and their children, then, or within a short time after the marriage, all the personal estate of which he should be possessed at the time of the marriage, the property of such estate is thenceforth changed and withdrawn from the exercise of any act of administration of it by the husband, which may go to defeat the covenant. Thus, if he invest the money in the purchase of land, the covenant will operate as a charge upon the land, and the money will be decreed to be paid out of it.(a) In *Randall v. Willis*,(b) there was a covenant by the husband, by articles before marriage, to settle, within three *weeks after the marriage, "all and singular his personal estate, of what nature or kind soever." This was effected by a settlement [*419] after marriage of all the personal estate of which the husband was possessed "at the time of the execution of the articles." In a suit by the widow, to have the settlement corrected by the articles, the covenant was treated as intended to embrace the personal estate when it could be ascertained, viz. at the death of the husband, giving the use to him clear and absolute, and the residue at his death to be the subject of settlement; but to be so settled, that it could not be disappointed by any act of the husband. And in *Needham v. Kirkman*,(c) a similar construction was put upon a covenant to settle all the husband's real estate, and also all his personal estate and effects, whatsoever and wheresoever. In *Randall v. Willis*, land pur-

(a) *Lewis v. Madocks*, 17 Ves. 57; *Lane v. Dighton*, Amb. 409.

(b) 5 Ves. 261.

(c) 3 B. & Ald. 531.

chased with the money covenanted to be settled was decreed to be conveyed by the heir to the widow upon the same uses as the money was covenanted to be settled. The decree, in this respect, seems to have been made without objection or argument by the heir. Whether, therefore, it would be followed in the same circumstances seems doubtful, as there was no covenant in the settlement for an investment in the purchase of land, which could have entitled the widow to have the land itself by virtue of a lien upon it.(d)

If the covenant be to settle such personal estate as the husband should at any time be possessed of during the coverture, this also will operate as a charge upon any lands in which the husband may invest the personal estate; and the wife surviving will be entitled to have the money called back, as clothed with the trust of the articles or settlement.(e)

[*420] *Where the covenant is to settle what the husband shall be possessed of at his death, the meaning, if it were construed strictly to attach upon every item of property as it became the husband's, would deprive him of the power of spending for the subsistence of himself or his family—a construction which never could have been intended by the parties. The true principle seems, that the husband retains a power of administration of his personal estate; but differing from such power in the hands of a person whose estate is subject to the customs of London or York, in this, that the husband's administration is limited to that which may go to improve the stock or capital, and to the spending and appropriation of the income; but that he cannot do any thing wilfully to disappoint the covenant.(f) Accordingly, whatever is properly income may be consumed;(g) and whatever part of the income is laid up by the husband, and treated as capital, will become such for the purposes of the settlement: as, where the husband borrows money to invest in land, and pays off the loan out of the income,(h) the money thus used in discharging the loan the widow will be entitled to have repaid out of the land.

Where the covenant, as in *Lewis v. Madocks*, is to settle whatever property the husband may become possessed of at any time during the coverture, it would be difficult for a court to ascertain the items upon which it should attach, so as to enforce its performance, if asked to do so during the coverture. No case of that kind has occurred; but should it occur, the Court would execute the covenant as well as it could. In the words of Lord Eldon, in the case last noticed, "if the Court should find a solid subject of personal property, it would attach it, rather than render the covenant perfectly nugatory;" although it would not make the subject of the settlement every chair and stool, and even the wearing apparel of the husband, which, [*421] if strictly *construed, the covenant would embrace. In *Randall v. Willis*, Lord Loughborough, adverting to this difficulty, said, "In the exposition of the words of the covenant, there was one construction they obviously could not bear; that was a specific settlement of every article of personal estate that, within the period allowed for the settlement, the husband might be possessed of." With regard to the power of administration

(d) *Lewis v. Madocks*, 17 Ves. 57; *Lench v. Lench*, 10 Id. 515.

(e) *Lewis v. Madocks*, 8 Ves. 155; 17 Id. 57.

(f) *Randall v. Willis*, 5 Ves. 274.

(g) *Lewis v. Madocks*, 17 Ves. 55.

(h) *Ibid.* 58.

possessed by the husband, where he has given his covenant to settle what he may die possessed of, it would seem, by analogy to the case of a father who had covenanted to settle upon the married couple such estate as he should die possessed of, that the husband may indulge in free and unlimited expense, enter into speculations, and do every thing consistent with a bona fide administration of the fund for its safe investment, if not for its increase.(i)

Where the husband has, before or during marriage, entered into a covenant to pay or leave his wife *at his death* a specified sum of money, the Courts have considered this as having been done with reference to the legal claims which she would at that period have upon his estate, independently of the covenant, and as intended rather to ensure to her at his death payment of the sum specified, in case her legal rights should give her less in amount, than to constitute a debt in her favour independently of and over and above her legal claims. Accordingly, should the husband die intestate, the widow in such case will not be entitled to receive payment of the sum covenanted, and afterwards to claim her share of the personalty under the Statute of Distributions; but the husband will be considered in law as having performed the covenant, by leaving his property in such a way that the legal distribution of it will ensure to the widow payment of that which he had covenanted to pay her. If, therefore, the distributive share exceed the sum in *the covenant, the covenant will be treated as [*422] performed:(k) and if the distributive share should fall short of the sum covenanted in amount, nevertheless it will be imputed as performance pro tanto.(l) But if the covenant is to pay the wife an annual sum, this will not be performed by what the widow takes under the intestacy.(m)

But if the covenant be one entire one, which the distributive share could not perform in its integrity, the share will not be imputed as performance pro tanto, so far as it can have that operation. Thus, a covenant to pay within three months after death £6000 to trustees, upon trust to pay the widow £1500, and the interest of the remainder for her life, was not held to be performed as to the £1500 by the share which the widow took of the husband's estate under the Statute of Distributions.(n)

It will not make any difference whether the words of the covenant by the husband have been that he will "leave," or that his executors will "pay;" for, as Lord Hardwicke said, in *Lee v. D'Aranda*,(o) "determinations must not be made on such minute circumstances." Neither will it be of any consequence, that, where a time is specified by the covenant within which the money is to be left or to be paid, that time does not correspond with the period at which the widow will be entitled to receive her distributive share; for the period of twelve months, allowed to executors for payment, has been adopted only from convenience, and would be disregarded in case it could be shewn that there were no debts of the intestate remaining undischarged, and does not affect the vesting of the rights of the parties entitled to take, which date from the death of the intestate.

(i) *Jones v. Martin*, 5 Ves. 268, n.

(k) *Blandy v. Widmore*, 1 P. Wms. 324; *Lee v. D'Aranda*, 1 Ves. sen. 1; *Gartshore v. Chalie*, 10 Ves. 1.

(l) *Gartshore v. Chalie*, 10 Ves. 15; but see *Wright v. Fearis*, 3 Swanst. 681.

(m) *Couch v. Stratton*, 4 Ves. 391; *Salisbury v. Salisbury*, 12 Jur. 671.

(n) *Couch v. Stratton*, ubi supra.

(o) 1 Ves. sen. 2; *Gartshore v. Chalie*, 10 Ves. 13.

[*423] *The legal presumption of performance which has been noticed will not be affected by the circumstance that the covenant is applicable to real as well as personal property. (p)

If the true principle upon which the Courts have proceeded be as has been stated above, viz. that they regard the covenant as intended only to fix at a specified sum what the widow shall be entitled to receive at the husband's death, instead of leaving her to the chance of what the amount would be according to her legal rights, it will necessarily follow, that the result must be the same, whether the intestacy arise from the absence of any will by the husband, or from his will having failed of effect; and this was so decided in *Goldsmid v. Goldsmid*. (g) There the intestacy was occasioned by the refusal of a trustee under the will of the husband to exercise a discretionary power, as to the disposal of his entire estate; and Sir Thomas Plumer determined, that the same principles, which regulated the decision where there had been an actual intestacy, must prevail where there was a quasi intestacy, for the widow in the one case, as in the other, took *pleno jure*.

Where the husband, after having covenanted to leave or pay his widow a specified sum at his death, does not leave matters upon the covenant and the legal rights of the widow in regard to her interest in his estate, but by will or otherwise gives her an interest in his estate, without reference to, or mention of, the covenant, whether the widow is to take the gift, and, at the same time, be entitled to demand performance of the covenant, will depend upon the general doctrines of law, applicable to satisfaction of debt by the voluntary gift of the debtor to the creditor. When the husband dies intestate there is an absence of any express act of volition that the widow should receive more than the covenant entitles her to; and, therefore, in [*424] *considering whether the covenant is performed by the distributive share, which the widow is entitled to by law, under the intestacy, the question to be considered is, whether the covenant is *in substance* performed. But where the husband, by his will, gives the wife an interest in his estate, without reference to the covenant by which he is already indebted to her, there is *prima facie* an intention of bounty and kindness in the gift, (r) which entitles it to be considered as voluntary, and not made in satisfaction of the covenant, unless there be strong circumstances of a contrary intention. (s) Though, therefore, the terms of the gift may raise a presumption against the intention of bounty to be inferred from the fact of the gift, and in favour of satisfaction of the covenant, that presumption will be rebutted by the existence of slight variations between the terms of the gift and the terms of the covenant; (t) for the Courts disapprove of the extent to which the earlier cases have carried the doctrine of satisfaction, denying to the words of a man their effect, to make him both generous as well as just, and confining them to the latter only; and, therefore, lay hold on slight circumstances to repel the presumption of satisfaction. (u)

(p) *Gartshore v. Chalie*, 10 Ves. 20.

(g) 1 Swanst. 211.

(r) *Gartshore v. Chalie*, 10 Ves. 17.

(s) *Rickman v. Morgan*, 2 Bro. C. C. 395; *Goodfellow v. Burchett*, 2 Vern. 298.

(t) *Clark v. Sewell*, 3 Atk. 97.

(u) *Mathews v. Mathews*, 2 Ves. sen. 636.

If the benefit under the covenant and the gift are identical, the one will be presumed to have been given in satisfaction of the other.(v) The same presumption will arise where the gift, though different from the covenant, is ejusdem generis, and equally certain and beneficial, so as to exhibit an intention of making the one a substitute for the other, which must be the true question in all cases of this kind.(w)

*And the presumption will prevail, though the gift may not be as valuable in the *manner* of taking it as the right under the cove- [*425] nant, if it is so in substance. Thus, if the gift be clogged with a burden, as with an annuity to another; still, if, after deducting this burden, the value of the gift is equal to, or exceeds, that of the covenant, the presumption of satisfaction will prevail.(x) But the presumption will not arise where the gift is substantially of less value than the covenant. Thus, an annuity of £10 by will was held not to go in satisfaction pro tanto of two annuities of £10 and £6, nor of the £10 alone, because the donee was a purchaser of that annuity, the consideration being the maintenance of her son; but it was treated as satisfaction of the lesser annuity of £6.(y) So, a legacy upon contingency, by an executrix, payable out of her own estate, was held not to be satisfaction of an unqualified legacy which she was bound to pay out of her testator's estate.(z)

In Haynes v. Mico,(a) a difference between the time at which performance of the covenant was due, and at which the gift was payable, was held to exclude the presumption: there the covenant was to pay £300 within *one* month after death, and the gift was a legacy of £500 payable within *six* months after death. But where the difference in point of date is in favour of the gift, as where it is payable sooner than performance of the covenant could be demanded, there it will be held as made in satisfaction of the covenant.(b)

As already said, the matter of the covenant, and of the gift, must be ejusdem generis, in order to admit the presumption of satisfaction. A gift of *lands*, therefore, cannot be pleaded as satisfaction of a covenant to pay a sum of *money*, nor can a gift of lands in *fee simple* be pleaded as satisfaction of a covenant to settle *an annuity* for life out of lands; [*426] although, if the value of the fee simple lands were taken, it would be more than adequate to purchase the annuity:(c) nor can a bequest of the *interest of real and personal estate for life* be pleaded as satisfaction of a covenant to pay a sum of money *absolutely*;(d) and, in Richardson v. Elphinstone,(e) a gift of a house for life, and of an annuity of £100, payable half-yearly, was not allowed to be satisfaction of covenant to pay the widow £200 as jointure, and £50 yearly to provide her with a house. But the conjunction in the gift of one thing similar with another dissimilar will not prevent the application of the doctrine of satisfaction, if that which is similar is alone sufficient to answer the purpose: thus, the gift of such a sum of money as,

(v) Graham v. Graham, 1 Ves. sen. 263.

(w) Goldsmid v. Goldsmid, 1 Swanst. 219.

(x) Brough v. Walker, 15 Ves. 514.

(y) Graham v. Graham, 1 Ves. sen. 263.

(z) Crompton v. Sale, 2 P. Wms. 553.

(a) Wathen v. Smith, 4 Madd. 325.

(b) Forsight v. Grant, 1 Ves. jun. 297.

(c) 1 Bro. C. C. 132.

(e) Eastwood v. Vinke, 2 P. Wms. 614.

(d) 2 Ves. jun. 462.

with the unascertained value of powder-works, would make up the sum of £10,000, was held to satisfy a covenant to pay £2000, because the money part of the gift exceeded £2000.(f) In *Forsight v. Grant*, as has been seen, the circumstance, that the value of the benefit taken under the will exceeded the value of the debt in the covenant, did not make any difference in the rule that there could not be satisfaction where the two things were very different in kind and value; and the same circumstance was equally unavailing for that purpose in *Alleyn v. Alleyn*,(g) and *Mathews v. Mathews*.(h)

In order to admit the presumption of satisfaction, it is necessary that the gift upon which it is raised should be not only as valuable, and of the same nature, as the matter of the covenant, but that it should be equally certain.

[*427] A *gift, therefore, of a general residue, the value of which depends upon several contingencies for its existence at all, cannot be treated as satisfaction of a covenant to pay a fixed sum, though, in the result, the gift should turn out to be more valuable.(i) According to the opinion of Sir William Grant, expressed obiter in *Bengough v. Walker*,(k) a gift, payable out of residuary estate, of a sum equal in amount to that covenanted to be paid, would be a satisfaction of the covenant; but, inasmuch as the fact of there ever being a residue out of which to pay the sum must be uncertain, this opinion seems open to doubt.

CHAPTER IV.

VALIDITY OF SETTLEMENT BY THE HUSBAND UPON THE WIFE BEFORE MARRIAGE AS AGAINST THE CREDITORS OF THE HUSBAND.

It will be convenient to consider here the validity of settlements made by the husband upon the wife prior to marriage, as against his creditors.

The consideration of marriage alone will be sufficient to sustain a settlement of personal estate against creditors. This is strongly shown by *Campion v. Cotton*;(a) there the plaintiff alleged that the husband, who was a stockbroker, had no property at the time of marriage, but a settlement was nevertheless executed by him and the wife, reciting that the wife was possessed of certain large sums of stock, and of real estate purchased with her money, and that, in consideration *of the marriage, these funds, the rents, &c., should be held for her separate use; but he alleged these recitals were false, as the sums of stock had been purchased with the money of the husband's employers, at a time when the husband was indebted greatly beyond the property he possessed. Sir William Grant, M. R., said, the fact of the husband being indebted at the time, and of the

(f) *Bengough v. Walker*, 15 Ves. 514.

(g) 2 Ves. sen. 37.

(h) *Id.* 635.

(i) *Barrett v. Beckford*, 1 Ves. sen. 520; *Devese v. Pontet*, 1 Cox, 188; *Adams v. Lavender*, 1 M'L. & Y. 41.

(k) 15 Ves. 514.

(a) 17 Ves. 263.

wife knowing him to be so, would not affect the validity of the settlement. Assuming the declaration that the property had been purchased with the money of the wife to be false, the husband not only could not controvert her right to any part of the property, but was compellable to do whatever acts might be necessary to invest her with a complete title to it. He had expressly covenanted to do so, and the marriage was a sufficient consideration for the covenant. All the wife could collect, from seeing it asserted in the declarations of trust, that the real estate had been purchased with her money, was, that the husband chose to take that mode of giving her those estates; but he did not think it could be inferred from the evidence, that she knew he was in such circumstances as to make his bounty to her a fraud upon any one; there was no proof of any fraud in her that could prevent her receiving *the benefit of the husband's obligation*.

*CHAPTER V.

[*429]

VALIDITY OF SETTLEMENT OF REAL PROPERTY BY THE HUSBAND UPON
THE WIFE BEFORE MARRIAGE, AS AGAINST PURCHASERS FROM THE
HUSBAND.

WITH regard to the real estate of the husband, apart from any consideration which may arise upon the general principles of law, as to the validity of a settlement of this kind of estate upon the wife, in a question with purchasers from the husband, it is necessary to keep in view the 27 Eliz. c. 4, which, by its 5th section, declares, that any conveyance of, or gift out of lands, &c., made by any person, with a condition of revocation at his pleasure, and not so revoked, shall be void as against subsequent purchasers. This statute, as its preamble shows, was intended to protect purchasers against the fraudulent prior conveyance of the seller, kept secret and concealed; and the object of this section is to protect a subsequent purchaser against a conveyance which, from the power to defeat it reserved by the maker, is presumed to have been framed for the purpose of defrauding the purchaser, by setting up rights in third parties, which, after the sale has been avoided, the maker of the conveyance may destroy by executing the power of revocation. It is the concealment of the conveyance, accompanied by the non-execution of the power of revocation, which is the fraud provided against by the statute.

The Court have extended the remedy given by the statute to marriage settlements made with a power of revocation reserved to the husband, (a) although the husband, *prior to the subsequent sale, had released the power of revocation; for, otherwise, as was observed by the [*430] Court in *Bullock v. Thorne*, (b) the husband might make a secret release of the power, or secret feoffment, of which the purchaser had no notice, and then shew the settlement to the purchaser, mentioning the power of revoca-

(a) *St. Saviour's case*, Lane, 21.

(b) *Moore*, 617.

tion, by which he would be encouraged to buy the land, and would be defrauded both of the money and the land by the secret release, against all equity and reason.

In construing the act, to ascertain what is a power of revocation, the Courts have given effect to the statute in cases beyond the letter of its provision, but within its spirit. Accordingly, they have held, that, if the settlement contain a proviso that it shall be void on payment of a sum of money, its validity will depend on whether the sum to be paid is merely nominal, or the full value of the interest settled. In the latter case, the settlement will be sustained; in the former, it will be void, and the proviso will be treated as in truth a power of revocation.(c)

Viewing the statute in the same spirit, where the power to revoke is given by an express clause to that effect, the Courts have held, that, if the exercise of the power is reserved, not to the husband, but to some other person, the validity of the settlement, as against a purchaser, will depend upon whether the person to whom the power is reserved be the trustee of the husband, and under his control. In that case, the settlement will be equally void, as if the power had been reserved to the husband himself.(d) On the other hand, if the person to whom the exercise of the power of revocation is reserved be beyond the control and independent of the husband, the settlement will be *good against a subsequent purchaser.(e) In the case [*431] just cited, the claimants under the conveyance, which was sustained, were purchasers for *valuable consideration*. This circumstance has raised a question whether the decision would have been the same if the conveyance had been to *volunteers*.(f) Sugden(g) says, it seems quite immaterial whether the settlement is merely voluntary or for valuable consideration, as the statute says, all conveyances which the grantor has power to revoke shall be void. It is not likely that a party would permit a power of revocation to be reserved in a settlement which had been made for value given; but, if he is so imprudent, the mischief to subsequent purchasers is the same as if the power had been reserved in a voluntary settlement or conveyance. But for the statute, it would be equally in the power of the settlor to conceal the settlement until after the sale—then to produce it; and, after having avoided the sale, to revoke the settlement, which would work the very evil which the statute was intended to remedy. Accordingly, in *St. Saviour's case*,(h) marriage was treated as being a good consideration, and yet the settlement was set aside, because of the reserved power of revocation.

In *Doe v. Martin*,(i) the power reserved was to the husband and wife to revoke the trusts of the settlement, and to the trustees, in that event, to sell the lands settled, so that they invested the price in the purchase of other lands, to be settled upon the uses of the settlement. No objection was raised to the settlement upon this statute of Elizabeth, upon the ground which has been just treated of. From this it may be assumed, as the case underwent great discussion, upon various objections, that both the Court [*432] and *the Bar considered a settlement unchallengeable which contains a power of this nature; and for this obvious reason, that it

(c) *Griffin v. Stanhope*, Cro. Jac. 454.

(d) *Lavender v. Blackstone*, 2 Lev. 146.

(e) *Buller v. Waterhous*, 3 Keb. 751; *Hungerford v. Earle*, Freem. Ch. Ca. 120.

(f) *Powell on Powers*, 330.

(g) *On Powers*, Vol. 2, p. 243.

(h) *Lane*, 21.

(i) 4 T. R. 39.

does not give any room for the suggestion of fraud, by what is simply intended to operate as a power of sale and exchange.

If the settlement reserve a power to charge the lands settled, the power will either be treated according to the import of its terms, or as a power to revoke according as the amount of the sum to be charged, with relation to the value of the lands, may discover the one or the other to be the true intention of the parties. If the sum be small with reference to the value of the lands, the settlement will be sustained, as containing merely a bona fide power to charge, and not a power, within the words of the statute, to revoke, determine, or alter the estate.^(k) If, on the contrary, the sum be equal or nearly equal to the value of the lands, it may be inferred that the settlement will be treated as void under the statute, because in truth containing a power to revoke under the disguise of a power to charge. *Tarback v. Marbury*^(l) is given by *Roper*^(m) as authority for this latter doctrine; but that case was between creditors, and seems rather to have been one of fraudulent conveyance to defeat creditors, and to have come under the 2d section of the statute; whereas the validity of conveyances, with a power of revocation as against purchasers, is regulated by the 5th section.

A power reserved to make leases with or without rent has also been held to amount to a reserved power of revocation, and to make the settlement void as fraudulent under the statute.⁽ⁿ⁾

*CHAPTER VI.

[*433]

OF THE POWER TO REVOKE, BEFORE MARRIAGE, A SETTLEMENT MADE IN CONTEMPLATION OF IT.

WITH reference to the rights of volunteers, and to that jurisdiction which courts of equity exercise for the protection of married women, it is material to consider whether a settlement executed by persons contemplating marriage can be revoked by them before marriage. Where a woman, in contemplation of future marriage, but without any communication with the intended husband, made a settlement in execution of a power by will to appoint a fund, whereby she directed the fund to be transferred, by the executors of the will, to the trustees of the settlement, to be held by them upon trusts for herself for life, and, after her death, for any husband she might have intermarried with, and, subject thereto, in trust for her children by any husband whomsoever, a deed executed by her before marriage, whereby she revoked the settlement, was sustained as effectual for that purpose, and to entitle her to have the money applied upon the trusts of a subsequent settlement, which had been executed by her and an intended husband with whom

(k) *Jenkins v. Keymis*, 1 Lev. 150.

(m) *Husband and Wife*, Vol. 1, p. 302.

(n) *Lavender v. Blackstone*, 3 Keb. 526.

(l) 2 Vern. 510.

she afterwards intermarried. (a) But, in another case, (b) a settlement of the wife's estate, arranged between her and her intended husband and the executor of her father's will, who acted in the matter quasi her guardian, whereby the estate was settled upon trust for the wife for life without power [*434] of anticipation, and, after the death of her or her husband, on *the survivor for life, with remainder to the children of the marriage, was revoked by deed-poll made before marriage, and without the knowledge of the executor, whereby the estate was to become the husband's *jure mariti*, but without the settlement, which remained with the trustees of it, having been cancelled; Lord Langdale, M. R., dismissed a suit against the trustees of the settlement for the purpose of compelling them to pay over the fund to an assignee from the husband; observing, that the parties might have broken off the marriage contract, and they would then have had a right to call upon the trustees to hold the funds upon other trusts; but they had not done so. The marriage contract had been considered by themselves as binding; and the marriage which took place was the same as that which had been contemplated when the contract was entered into. Undue influence had not been proved, no doubt; but the Court did not wait for proof of it. It might have been exercised by soothing, or it might have been by violence. The woman might have been free if she had consulted her friends; but having consulted them respecting the marriage, and not having obtained their consent, he could not think the husband was entitled to consider her as emancipated. He could not, therefore, consider the settlement as revoked.

[*435]

*BOOK II.

SETTLEMENTS BY THE HUSBAND UPON THE WIFE MADE AFTER MARRIAGE.

It will be convenient to consider settlements made after marriage in two points of view—first, as they are adverse to the wife, and give the husband the title of a purchaser of her property, and those claiming under him a right to take it against the wife surviving; and, secondly, as they are beneficial to the wife, and give her a title to claim as against the husband, and all having title under him, including his creditors in bankruptcy or insolvency.

(a) *Beatson v. Beatson*, 12 Sim. 281.(b) *Page v. Horne*, 9 Beav. 570; 12 Jur. 340.

CHAPTER I.

SETTLEMENT AFTER MARRIAGE, HOW FAR BINDING UPON THE WIFE.

THE person of a married woman is, as it were sunk in that of her husband; she is, therefore, incapable of contracting personally, even with him, unless, indeed, where property has been, by the act of the donor of it, given to her as separate estate, in regard to which she enjoys the character of a feme sole, and may contract with any one, as will be shewn elsewhere. (a) So far, therefore, as a settlement, made *after* marriage, gives to the husband any *property of the wife, even for valuable consideration, the settlement will be void against the wife surviving, and she will be entitled to take as if it had never been made. (b) No doubt, in *Sykes v. Meynall*, (c) the husband was declared to be entitled to the wife's mortgage by purchase, under a settlement made after marriage. That was, however, under these special circumstances; that the husband had given the wife, by the settlement, a jointure of £400 per annum, which, as appears by the note to *Roper*, (d) she had accepted and enjoyed after the husband's death. The wife obtained therefore, not only an equivalent by the settlement, but, after she had become *sui juris*, had adopted it, so far as it was in her favour; she was therefore bound to confirm it in other respects. This consideration, though it is not noticed by *Dickens* as the ground of the judgment, may probably have been so, and may reconcile the apparent discrepancy between this case and *Lannoy v. Duke of Atholl*, which latter case was adverted to by the Chancellor in his judgment in *Sykes v. Meynall*. In the absence, therefore, of any act of confirmation by the wife, after the determination of the coverture, a settlement, made between her and her husband after marriage, will be inoperative to defeat her title by survivorship; and it will not make any difference that her parent or guardian (if she is an infant) concurred in, or was a party to, the settlement; nor that provision, made for her by it, is equal to the share which the Court would have settled upon her, in case the husband had desired to reduce the property into possession. If she survive, she will take the whole property, unaffected by the settlement. (e)

If the settlement, made *after* marriage, be beneficial for the wife, it will be binding against the husband, and all *claiming under him, though it had been made without consideration from her; for voluntary settlements are good between parties competent to transact, and the husband was *sui juris*, though the wife was not. (f)

(a) Vide post, p. 494.

(b) *Lannoy v. Duke of Atholl*, 2 Atk. 448.

(c) 1 Dick. 368.

(d) *Husband and Wife*, Vol. 1, p. 304.(e) *Stamper v. Barker*, 5 Madd. 157.(f) *Watts v. Buller*, 1 P. Wms. 60; *Ball v. Newton*, 1 Vern. 464.

CHAPTER II.

VALIDITY OF SETTLEMENT AFTER MARRIAGE AGAINST THE CREDITORS OF THE HUSBAND, WHEN MADE IN PERFORMANCE OF AGREEMENT ENTERED INTO PRIOR TO MARRIAGE.

A SETTLEMENT made after marriage being good against the husband, where it is advantageous for the wife, it might seem, at first view, that it ought to be equally available to her in competition with the creditors of the husband, who come in his right; but it is not so. Before marriage, the right, which the celebration of that ceremony gives to the husband over the person and property of the wife, is a good consideration to support any settlement he may make upon her, not only against the husband himself, but against those claiming under him. The settlement is the equivalent which the wife, while yet *sui juris*, has stipulated for in return for the benefits which the marriage will confer upon the husband. But when the wife has given up both her person and her property, without obtaining any settlement in return, and by the marriage has lost her capacity to contract, if the husband then make a settlement upon her, its validity, against the creditors of the *husband, will depend upon whether he has made it in [438] performance of something promised, but not perfected before marriage, or as a spontaneous, voluntary act.

If a settlement after marriage be made in conformity with, or in performance of, a *written* agreement, entered into *before* marriage, in the form either of articles or of letters, it will be unimpeachable by the creditors of the husband.(a) It will not be sufficient, however, that the writing, which the settlement professes to be made in performance of, shews merely an agreement for a settlement upon *some* terms, leaving the nature of the terms to be ascertained aliunde; the writing must so specify the terms as that specific performance of them could be compelled.(b) It has been attempted to make a recital, in the settlement, of articles having been prepared prior to the marriage, supply the want of the articles themselves, which were not forthcoming. This was successful in an Anonymous case,(c) but was defeated in *Wilson v. Pack*,(d) where the Chancellor said, that, to permit it, would be of dangerous consequences; and, in *Battersbee v. Farrington*,(e) Sir Thomas Plumer, M. R., said, it would be difficult to maintain that such a recital would be binding upon creditors. Such a doctrine would give to every trader a power of excluding his creditors, by a recital in a deed to which they were not parties. These observations were made in a case, the circumstances of which, while they negatived any suspicion of fraud, alone justified the apparent extravagance of the attempt.

If the agreement entered into *before* marriage, in respect of which the settlement *after* marriage was made, were by *parol* only, it is very question-

(a) *Bovy's case*, Vent. 191; *De Biel v. Thomson*, 3 Beav. 469.

(b) *Rose v. Cunninghame*, 11 Ves. 555; *Randall v. Morgan*, 12 Id. 72.

(c) *Pre. in Ch.* 101.

(d) *Id.* 297.

(e) 1 Swan. 113.

able whether it would support the *settlement. In *Bovy's case*,^(g) [*439] it was agreed by the Court, that "but a verbal agreement for a settlement would have served the turn to take away the colour of fraud, whereby a purchaser might avoid the settlement." This was said five years prior to the passing of the Statute of Frauds,^(h) which enacts, that "no action shall be brought, whereby to charge any person upon any agreement made upon consideration of marriage, unless the agreement, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." It may be said that the agreement, though by parol, being established, marriage is such a part performance as would take the case out of the statute; but, in *Dundas v. Dutens*,⁽ⁱ⁾ according to the report of the case in *Vesey*, and in *Redding v. Wilkes*,^(k) Lord Thurlow said that had been held not to be the case; and, in *Randall v. Morgan*,^(l) Sir William Grant, M. R., said, a parol promise before marriage was in itself a nullity. On the other hand, according to the report of *Dundas v. Dutens*, by Cox,^(m) Lord Thurlow said, "He could not conceive that a settlement made after marriage, in pursuance of an agreement before marriage, though only parol, could ever be reckoned a fraudulent settlement: the cases had never gone such a length as that;" and, in *Shaw v. Jakeman*,⁽ⁿ⁾ Lord Ellenborough said, "Perhaps, even a parol agreement, followed by marriage and payment of the money to the trustee, would be such part execution as to prevent the assignees of the husband claiming it, for Lord Thurlow held, in *Dundas v. Dutens*, that a settlement of a wife's property after marriage, in pursuance of a parol agreement, was good against the husband's creditors."

* However, it is certain that Equity will relieve even against the words of the Statute of Frauds, if the parol agreement, made before [*440] marriage, has not been reduced into writing through the fraud of the husband, as by the substitution, at the time of execution, of another deed for that which had been agreed upon. The wife will not, however, be entitled to relief against the words of the statute, if the mode in which she has suffered be, that she has trusted to the promise of the husband, which he has failed to perform, for, then, *sibi imputet*.^(o)

CHAPTER III.

VALIDITY OF SETTLEMENT AFTER MARRIAGE AGAINST CREDITORS, WHEN MADE AS A VOLUNTARY ACT OF THE HUSBAND.

It remains to consider the validity, as against the creditors of the husband, of a settlement made by him after marriage, not in satisfaction of any

(g) Vent. 194.

(i) 1 Ves. jun. 199.

(k) 12 Ves. 73.

(n) 4 East, 207.

(o) *Montacute v. Maxwell*, 1 P. Wms. 618.

(h) 29 Car. 2, c. 3.

(k) 3 Bro. C. C. 401.

(m) Vol. 2, p. 235.

agreement entered into between him and the wife before marriage, but as a voluntary spontaneous act on his part. The law, upon this subject, is regulated by the 13 Eliz. c. 5, an act which was passed for the protection of creditors, and the provisions of which extend to personal as well as to real estate.

The difference between the terms of this enactment for the protection of creditors, and of the 27 Eliz. c. 4, a statute passed for the protection of purchasers, is not great; yet, the construction which has been put by the Courts upon these two statutes, so far as they affect the validity of voluntary settlements, has been widely different. It will *be seen,^(b) [*441] that, according to the construction put by the Courts upon the 27 Eliz., or, rather, according to the way in which they have taken upon them to administer that statute, a voluntary settlement is, as between those entitled to take under it, and a subsequent purchaser for valuable consideration, a fraud upon the purchaser, without the necessity for any evidence of such an intention on the part of the settlor, and even in the face of evidence that the purchaser had received notice of the settlement prior to his purchase. Although the terms of the 13 Eliz. are fully as susceptible of such an interpretation in favour of creditors, as has been put upon the 27 Eliz. in favour of purchasers, this view of the former statute has not been taken by the Courts. It is, no doubt, true that Lord Hardwicke, in two cases, *Fitzer v. Fitzer*^(c) and *Taylor v. Jones*,^(d) shewed his inclination to give the same construction to both statutes; but, upon more mature consideration, he appears to have changed his mind, for, in *Townsend v. Windham*,^(e) decided seven years afterwards, he pointed out the distinction between the 13 Eliz. and the 27 Eliz., and, in this, he was followed by Sir L. Kenyon, in *Stephens v. Olive*;^(f) and now it may safely be said, as will appear when the subject is more fully opened, that, under the 13 Eliz., the validity of any given voluntary settlement, in a question between those entitled under it and the creditors of the settlor, depends upon the circumstances under which it was granted, as indicating the true intention of the settlor—whether to defraud his creditors, or to give to the parties entitled under the terms of the instrument the benefits professed to be conferred by it without any intention of fraud.^(g)

Before entering upon an inquiry as to the validity of a *settle- [*442] ment voluntarily made by the husband upon the wife after their marriage, in questions between the husband or wife, and the creditors of the husband and purchasers from him of his real property, it will be necessary to clear the way for this discussion by a few remarks as to what is to be considered a “voluntary settlement,” in the sense in which that term has been adopted in the discussion of questions with creditors and purchasers, and who is to be considered a “purchaser for valuable consideration.” If the settlement should not have been made in performance of any agreement before marriage, but out of the benevolence and bounty of the husband, in the discharge of his natural moral duty to provide for his wife and children,

(b) Post, p. 453.

(d) Id. 600.

(f) 2 Bro. C. C. 91.

(g) *Gale v. Williamson*, 8 M. & W. 405.

(c) 2 Atk. 511.

(e) 2 Ves. sen. 11.

it is, nevertheless, considered to be voluntary,^(h) and open to challenge by a purchaser for valuable consideration, as will be presently noticed. But, according to an old authority,⁽ⁱ⁾ if the settlement has been made in the form of a purchase by the husband in the name of a child, it will not be open to the challenge which has been adverted to.

Then, as to who is to be considered a purchaser for valuable consideration. He is a person who has bona fide purchased the property in settlement, by a price *paid* or a consideration *given*; that is, a valuable consideration, as distinguished from considerations of nature, blood, or the like. He will not be such if he have paid the money, and the seller have returned it to him.^(k) But, having given a consideration, the Court will not enter into the adequacy or inadequacy, unless the inadequacy be such as to throw a doubt upon the bona fides of the transaction.^(l)

* Having made these preliminary observations, let us now consider the validity of a settlement made by the husband upon the wife after [*443] their marriage, as a voluntary act of bounty on his part, where it is questioned by the creditors of the husband, or by a purchaser from him for valuable consideration, treating the right of these two classes of persons separately, by reason of the difference of interpretation, which, as observed, the Courts have put upon the statutes regulating their rights in this respect, viz. 13 Eliz. c. 5, as to creditors, and 27 Eliz. c. 4, as to purchasers.

§ 1.—*Validity of Voluntary Settlement by Husband upon the Wife against Creditors of the Husband.*

The 13 Eliz. c. 5, declares, that "all gifts," &c. "to the end, purpose, and intent to delay, hinder, or defraud creditors, shall be taken only as against the person, whose action, suit, debt," &c. "shall, or in any way might, be disturbed, hindered, delayed," &c., "to be void, and of none effect."

In order to make a settlement void as against creditors under this statute, it is not sufficient for them to prove that the settlor was indebted at the time he made it; for, as observed by Lord Langdale, M. R., in *Townsend v. Westacott*,^(m) there is scarcely any man who can avoid being indebted to some amount: there may be withholding of claims contrary to his intention, by which he is kept indebted in spite of himself. According to the opinion of Sir R. P. Arden, the question must depend upon whether the settlor was in solvent circumstances at the time.⁽ⁿ⁾ In *Norcutt v. Dodd*,^(o) Lord

(h) Woodie's case, in *Colville v. Parker*, Cro. Jac. 158; *Goodright v. Moses*, 2 W. Bl. 1019; *Chapman v. Emery*, Cowp. 278; *Evelyn v. Templar*, 2 Bro. C. C. 148.

(i) *Upton v. Bassett*, Cro. Eliz. 444; *Lady Gorge's case*, cited in *Crisp v. Pratt*, Cro. Car. 550.

(k) *Humphreys v. Pensam*, 1 My. & Cr. 588.

(l) *Upton v. Bassett*, ubi supra; *Metcalf v. Pulvertoft*, 1 V. & B. 184; see also Sugd. on Powers, Vol. 2, p. 246, 6th edit.

(m) 2 Beav. 344.

(o) Cr. & Ph. 100.

(n) *Lush v. Wilkinson*, 5 Ves. 387.

Cottenham seems to have thought proof of actual insolvency necessary. And in *Martyn v. *Macnamara*,^(p) Sir Edward Sugden treated that [*444] opinion as settled law; but the more correct view seems to be, that the validity of the settlement depends upon the fact, whether the settlor, at the time he made it, was so far indebted as to make it obvious that the intention of the settlement was to defeat the payment of his debts. In *Richardson v. Smallwood*,^(q) Sir Thomas Plumer, M. R., said he did not conceive it necessary to shew that the party was insolvent: the question was, whether the Court was satisfied that the deed was made to hinder and delay creditors by placing the property out of their reach? And Lord Langdale, in the case just noticed,^(r) said, that, to require proof of insolvency, was inconsistent with the principle of the statute and with the judgments of the most eminent judges.

It is certain, however, that the settlement will not be void, merely because the settlor was considerably indebted at the time he made it. This circumstance will not of itself be evidence of intention to defraud; for the circumstances may shew that the settlement was not intended to interfere with the due liquidation of the settlor's obligations. Thus, if the existing debts be secured by mortgage, that will negative any idea of intentional fraud in the settlement.^(s) In *George v. Milbanke*,^(t) Lord Eldon, commenting upon *East India Company v. Clavel*,^(u) says, that "a provision in the settlement for payment of the settlor's debts would make it good against all future creditors. If it would not have absolutely this effect, at all events it would furnish a strong, if not a conclusive argument against the imputation of fraud."^(v)

If the mere fact of the settlor *being* indebted at the time, without [*445] *regard to his intention in making the settlement, as indicated by his ability to pay, will not make the settlement void as between those taking under it and the creditors of the husband; so, on the other hand, the mere fact of the husband *not* being indebted at the time, without regard to his intention to contract debts and defeat the payment of them, will not bar the challenge of the settlement as void under the statute. No doubt, if the settlor be not indebted at the time of making the settlement further than most men must be, as already shewn, and the settlement have been made without a view to the contraction of debt, it will be good against creditors in subsequently contracted debts, even although the settlement be in favour of strangers;^(w) but if the settlor, though not indebted at the time of making the settlement, have contracted debt "immediately, or soon after, so as to collect from thence the intention to be fraudulent, in order to defeat creditors," that will be sufficient to avoid the settlement;^(x) for it is not necessary that a man should be actually indebted at the time he enters into a voluntary settlement, in order to make it fraudulent: if he enters into it with a view to being indebted at a future time, it is equally fraudulent.^(y) In *Assignees of Gardner v. Shannon*,^(z) Lord Redesdale set aside a settle-

(p) 4 D. & W. 427; see also *Shears v. Rogers*, 3 B. & Ad. 362.

(q) 1 Jac. 557.

(s) *Stephens v. Olive*, 2 Bro. C. C. 91.

(u) *Pre. in Ch.* 377.

(w) *Holloway v. Millard*, 1 Madd. 419.

(x) *Walker v. Burrows*, 1 Atk. 93, 94.

(y) *Stileman v. Ashdown*, 2 Atk. 480.

(r) *Townsend v. Westacott*, 2 Beav. 344.

(t) 9 Ves. 194.

(v) *Nunn v. Wilsmore*, 8 T. R. 521.

(z) 2 Sch. & Lef. 228.

ment which had been made at a time when the settlor was not indebted more than £20, but when he was on the eve of entering into a partnership which soon afterwards ended in a bankruptcy. From this case it may be safely said, that the Courts will bring the settlement within the operation of the statute, where its intention has been to protect the property covered by it from the effect of liabilities which the settlor at the time contemplated entering into.

*Creditors, then, whose debts have been incurred immediately, or so soon after the making of the settlement as to raise a presumption [*446] of an intention to defraud them by its operation, are entitled to challenge it upon the statute; and it is obvious that they are entitled to do so within the words as well as intent of the statute; they are persons whose debts are defrauded by the settlement: and they would be entitled to the challenge, although their debts might not have been contracted "immediately" before the making of it, if the circumstances were sufficient to shew an intention to defraud them. The qualification which Lord Hardwicke gave in *Walker v. Burrows*,^(a) by the use of the words "immediately or soon after," was not used by his Lordship as intending to lay down that the lapse of considerable time between the making of the settlement and the incurring of the debt would rebut the presumption of fraud arising from the nature of the settlement; for the same judge, in *Stileman v. Ashdown*,^(b) where the interval between the date of the settlement and the incurring of the debt was no less than thirty-seven years, nevertheless set the deed aside, because from its nature, and the possession had under it, he considered that the settlement had been made with a view to being afterwards indebted.

If a settlement be challenged as void under the statute, because intended to defraud creditors whose debts had already been contracted, or whose debts were intended by the settlor to be contracted after the date of the settlement, the challenge may be taken advantage of by creditors whose debts were not contracted until after that time. From an observation made by Sir William Grant, M. R., in *Kidney v. Coussmaker*,^(c) that a "voluntary settlement is fraudulent only against such creditors as were creditors at the time," it has been argued, that, although the settlor was "indebted at the time, subsequent creditors cannot have the benefit of a challenge of the settlement; but that observation [*447] must be taken *secundum subjectam materiam*. In *Kidney v. Coussmaker* there was no evidence of the existence of any debts at the time of the settlement; so that his Honor's observation did not infer, that, if there had been such debts, the subsequent creditors would have been excluded from challenging the settlement; but if the observation was meant to convey such an inference, it would be opposed to several old as well as modern authorities. In *Walker v. Burrows*,^(d) Lord Hardwicke said, if the settlor had been indebted at the time, it would have run on, so as to take in all subsequent creditors; and in *Taylor v. Jones*,^(e) the same judge said the word "others" seems to be inserted in the statute to take in all manner of persons, as well creditors after as before the settlement, whose debts shall be defrauded; and in *Richardson v. Smallwood*,^(f) where the plaintiff was

(a) 1 Atk. 93.
(d) 1 Atk. 94.

(b) 2 Id. 477.
(e) 2 Id. 601.

(c) 12 Ves. 155.
(f) Jac. 552.

creditor under a breach of covenant by the settlor, which did not take place until after the settlor's death, Sir Thomas Plumer, M. R., said, if the deed was void as against those creditors, who continued so at the death of the settlor, it was settled that all creditors may take advantage of the nullity; the settlement became part of the assets, and nothing after that time could alter it.

Assuming that subsequent creditors may take advantage of a challenge of a settlement, where the settlor was indebted at the time of making it, or where he made it with a view to defeat payment of debts, which he then had it in contemplation to incur, when it has been instituted by a prior creditor, the question still remains, can a subsequent creditor himself *institute* such a challenge? In *Lush v. Wilkinson*,^(e) Sir R. P. Arden, M. R., doubted [^{*448}] to relief, "without proving any one antecedent debt." From this it may be inferred, that his Honor's opinion was, that subsequent creditors would be entitled to relief if they gave the proof suggested; and in *Richardson v. Smallwood*,^(f) where the objection was taken that the suit was by subsequent creditors, it was overruled by Sir Thomas Plumer, M. R.; and in *Ede v. Knowles*,^(g) Sir J. K. Bruce, V. C., decreed a mortgage, made in respect of a debt, contracted after the date of a settlement, to be effectual against the settlement. The rule, therefore, may be considered as being, that, where there are debts owing by the settlor, which were contracted prior to the date of the settlement, subsequent creditors may take advantage of them to institute a challenge of the settlement.

But a still further question remains, whether, supposing the settlor to have been indebted at the time of making the settlement, and to have made it under circumstances which would have sustained a challenge under the statute, subsequent creditors will be entitled to challenge the settlement, although those whom it was intended to defraud may all have been paid prior to the contraction of these subsequent debts, or to the institution of the challenge. Sir Thomas Plumer, in *Richardson v. Smallwood*, seems to have thought that the subsequent creditors must be entitled to the challenge under such circumstances, otherwise it would be easy to evade the statute by the settlor borrowing money after the date of the settlement, and with it paying off the prior creditors; but it is obvious that the lender, in such a case, would come within the purview of the statute, and within that class of cases, which has been already noticed as having the benefit of the statute, [^{*449}] where the debt is contracted immediately, or soon after the date of the settlement, so as to suggest that the settlement was intended to defraud it. The particular case does not appear, however, to have ever arisen.

If the property covered by the settlement be of such a nature that the creditors could not attach it, even if the settlement were out of the way, they are not prejudiced by the settlement, and cannot challenge it under the statute. Thus, if the property be a chose in action, which cannot be taken in execution, the settlement will not be challengeable under the statute;^(h) but, according to the authority of Lord Hardwicke, in two cases,⁽ⁱ⁾

(e) 5 Ves. 387.

(f) Jac. 556.

(g) 2 Y. & C. C. C. 172.

(h) *Norcutt v. Dodds*, Cr. & Ph. 102.

(i) *Taylor v. Jones*, 2 Atk. 600; *King v. Dupine*, 2 Id. 602, n.

if the property, although it cannot be reached by legal execution, have been made the subject of a trust, so as that a court of equity could work out the relief by acting in personam, the creditors would in this way be entitled to the benefit of the statute. The authority of these two cases was, however, questioned by Lord Thurlow in *Dundas v. Dutens*,^(k) and by Lord Eldon in *Rider v. Kidder*;^(l) and the dissent of these two judges seems to have been concurred in by Lord Cottenham in *Norcutt v. Dodd*.^(m)

With regard to the nature of the debt required to support a challenge of a settlement, under the 13 Eliz., as void against creditors, it is not necessary that the debt should be absolutely payable; a contingent debt will be sufficient, although the contingency upon which the payment depends may not have happened at the date of the settlement, as appears by *Rider v. Kidder*,⁽ⁿ⁾ where the plaintiff's debt was of this kind. The observations of Lord Eldon, upon the objections taken to the nature of the debt in that case, are unintelligible, as they are given by the reporter; but the inquiries directed by the decree shew that the suit was *sustained, though [*450] founded upon a debt which was contingent.

It must be observed, that the benefit of the 13 Eliz. is confined to *creditors*, and that it is not open either to the personal representative of a settlor, or to any one taking by voluntary gift from him, to challenge the settlement upon the ground of debts owing by the settlor at the date at which it was made. As to them, the deed is in this respect perfectly good.^(o) Sir William Grant, in *Curtis v. Price*,^(p) said, "The settlement is void only as against creditors, but only to the extent in which it may be necessary to deal with the estate for their satisfaction, is it as if it had never been made. Satisfy the creditors, and the settlement stands." So that the personal representatives of the settlor and volunteers from him can neither institute a challenge of the settlement upon the statute, nor derive any benefit from the challenge after it has been instituted by persons having a right to institute it. This was well illustrated in *Ex parte Bell*.^(q) In that case, the settlement, which had been made while the husband's interest in lands was as yet reversionary, so that dower could not attach, was set aside at the suit of the assignees in bankruptcy of the husband, but was sustained as good against the bankrupt's wife, to bar her claim to dower; and she was left to take the benefit of the settlement out of any surplus estate which might remain after the creditors should have been satisfied.

The fact of the settlor having been indebted at the date of the settlement is not the only evidence of fraud which will entitle a creditor to the benefit of the 13 Eliz. There are other proofs of fraud equally available to him. Thus, if the settlor reserve power generally to mortgage the estate, this will make the settlement challengeable; and for an obvious reason, because, under this power, the settlor might charge *the estate to its [*451] full value. As was said in *Turbach v. Marbury*,^(r) this "amounts in effect to a revocation," and makes the settlement fraudulent as against creditors. It is, in effect, under cover of a gift to others, reserving to the giver full

(k) 1 Ves. jun. 198.

(m) *Ubi supra*.

(o) *Hawes v. Leader*, Cro. Jac. 270.

(p) 12 Ves. 103.

(r) 2 Vern. 510.

(l) 10 Ves. 367.

(n) 10 Ves. 360.

(q) 1 G. & J. 284.

power over the subject of the gift. It may be inferred, from the form of expression used by the Court in *Turbach v. Marbury*, as well as from the nature of the thing, that if the settlement contain a general power of revocation, this, which, by the terms of the 27 Eliz. makes a settlement void as against *purchasers*, would have the same effect as against creditors under a just construction of the 13 Eliz., though an express provision to this effect is wanting in the latter statute. If the settlor reserve to himself a material interest in the property, so as nearly to exhaust its value, that also will be a strong circumstance of fraud, and was, in *Russell v. Hammond*,^(s) held sufficient to avoid the settlement, as a plain badge of fraud, amounting almost to a continuance in possession.

This observation, in the case last noticed, suggests the position, that continuance in possession by the settlor after having made the settlement, without any provision to this effect being contained in the instrument, which, *ex facie*, purports to make an absolute transfer of the property, will avoid the settlement, as in *Stone v. Grubham*, where an absolute conveyance of a lease for years, without any delivery of possession having taken place at the time, was declared to be void; and, in *Edwards v. Harben*,^(t) where an absolute bill of sale, with a verbal agreement that the purchaser should not take possession or make sale until after the expiration of fourteen days, was also declared to be void. This last case, in which many previous ones were examined, settled the law upon the subject, that possession must "accompany and follow the deed." Accordingly, if the conveyance be conditional *ex facie* of the deed, and possession *be retained [*452] by the maker until the condition is performed, that will not vitiate the deed, because the possession is consistent with, and "accompanies and follows" the deed per Buller, J., in *Edwards v. Harben*; ^(u) or, as was said by Lord Eldon, in *Arundell v. Phipps*,^(v) "the mere circumstance of possession amounts to no more than it is, *prima facie*, evidence of property in the man possessing, until a title not fraudulent is shewn under which that possession has followed;" as, where a friend purchases from the sheriff under an execution, and allows the debtor to continue in possession.^(w) Yet possession in conformity with the deed will not conclude the matter; for the deed is open to challenge upon the other grounds, which have been noticed.^(x)

§ 2.—*Validity, under 27 Eliz. c. 4, of Voluntary Settlement by the Husband upon the Wife, made after Marriage, as against Purchasers from the Husband.*

The 27 Eliz. c. 4, declares, that all conveyances, &c. of "lands, tenements, or other hereditaments, made for the intent and of purpose to defraud and

(s) 1 Atk. 16.

(t) 2 T. R. 587.

(u) 2 T. R. 596.

(v) 10 Ves. 145.

(w) *Kidd v. Rawlinson*, 2 B. & P. 59.

(x) See, also, upon this subject, *Simmons v. Edwards*, 16 M. & W. 838, where the question arose under the Bankruptcy Acts.

deceive such persons as have purchased or shall purchase the lands," &c. so conveyed, shall be void as against such purchaser. Before going further, it may be proper to remark, that this statute is, in terms, confined to real estate, and has been so limited in its application.(y)

According to the obvious and plain meaning of this statute, a *voluntary* settlement was not rendered void, unless it could also be shewn to be covenous and fraudulent. Such was the opinion of Lord Mansfield, expressed in more *than one case,(z) and there were several old authorities to support him in that opinion.(a) But Lord Ellenborough, in *Otley* [*453] v. Manning,(b) at delivering the opinion of the Court of King's Bench, after noticing those cases, and a reference by Lord Mansfield, in *Doe v. Routledge*, to the third section of the statute, which subjects to forfeiture and imprisonment parties setting up the conveyances struck at by the statute, as shewing that these conveyances must be fraudulent and covenous, and not merely voluntary, in order to make them void, said that that section afforded a very strong argument in favour of such a construction; and, had these cases not been opposed by many others of great weight and authority, there would have been little doubt in the mind of the Court as to its being the right construction; but they had to deal with a class of cases full as numerous, which had given the statute a different effect, and had held that a conveyance made without a *valuable* consideration was, by the statute, void, as, on that account, fraudulent against a subsequent purchaser for such consideration. His Lordship then went through the cases, which will be found at the foot,(c) and drew attention to *Evelyn v. Templar*,(d) in which Lord Thurlow said, "It would have been as well, at first, if the voluntary covenant had not been so little thought of: yet the rule was such, and so many estates stand upon it that it cannot be shaken;" and to *Bothell v. Martyr*,(e) in which De Grey, C. J., said, "that the deed in question was only a *voluntary* conveyance within the true meaning of the 27 Eliz., being *founded only [*454] on a *good*, and not on a *valuable* consideration, and, therefore, could not be set up against a bona fide purchaser;" both of which cases were decided subsequent to the contrary opinion expressed by Lord Mansfield in *Cadogan's Trustees v. Kennett* and *Doe v. Routledge*.(f) His Lordship, after these observations, gave the judgment of the Court, that a voluntary conveyance was "fraudulent as such within the statute of 27 Eliz." The doctrine established by this case may be considered as now settled; for, in *Hill v. Bishop of Exeter*,(g) Mansfield, C. J., at delivering the judgment of the Court, said, "On the general doctrine, that voluntary deeds, however reasonable, are void against a subsequent deed in consideration of money, there can be no doubt; for very strong cases have decided, that, if a man after marriage make the most prudent settlement on his wife and children,—such a deed as every wise man must approve,—if the father is dishonest enough to sell it afterwards for money, he may."

(y) *Jones v. Croucher*, 1 S. & S. 317.

(z) *Cadogan's Trustees v. Kennett*, Cowp. 432; *Doe v. Routledge*, Id. 705.

(a) *Bovy's case*, Vent. 193; *Garch v. Mois*, Keb. 486. (b) 9 East, 59.

(c) *Woodie's case*, in *Colville v. Parker*, Cro. Jac. 158; *White v. Hussey*, Pre. in Ch. 14; *Gardiner v. Painter*, Ca. temp. King, 65; *Tonkins v. Ennis*, 1 Eq. Ca. Ab. 334; *Goodright v. Moses*, 2 W. Bl. 1021; Cowp. 280; *Currie v. Nind*, 1 My. & Cr. 25.

(d) 2 Bro. C. C. 148.

(e) 1 B. & P. N. C. 332.

(f) Vide ante, p. 453.

(g) 2 Taunt. 82.

Where a man sells land, and afterwards attempts to set up against the purchaser a settlement which he had previously made of the same property upon his wife and children, it may justly be presumed against him, that he intended such an obvious fraud from the beginning; and with regard to the wife and children, though no fraud can be imputed to them, yet, as they have no higher title to the benefits which the settlement is intended to give them than the bounty and benevolence of the husband, it is but just that these claims should be postponed to the right of the purchaser to have that for which he has paid the price. However much, therefore, the courts may have strained the words of the statute beyond their natural meaning—by holding them to make fraudulent and void as against subsequent purchasers, a settlement which, in its inception, may have been altogether free from [*455] such a vice in a moral point of view,—they have not done anything necessarily contrary to natural reason and justice. It is not so apparent how this can be said of another doctrine, which, nevertheless, seems to be established by cases of some antiquity, recognised by no less a judge than Sir W. Grant; and that is, that a voluntary settlement is void against a purchaser, notwithstanding he may have had notice of it prior to his purchase. It is difficult to conceive how a purchaser can be defrauded in such circumstances; but the cases have determined, even as against him, that the settlement is fraudulent and void.^(h) The effect of the decisions has been, in the words of Sir W. Grant, in *Buckle v. Mitchell*,⁽ⁱ⁾ to treat a voluntary settlement as against a purchaser for valuable consideration as “a nullity and a fraud.” This being the principle, the fact of the purchaser having had notice of the settlement previous to his purchase, can, of course, make no difference in the case; for, in that view, he has notice, not of a title, but of a nullity. The best observation that can be made upon this doctrine, not in justification of it, but as a reason for not disturbing it, is expressed in the words which fell from Sir W. Grant in the same case:—“It is difficult to persuade oneself, that the words of the statute warranted, or that the purpose of it required such a construction; but it is essential to the security of property, that the rule should be adhered to when settled, whatever doubt there may be as to the ground on which it originally stood.”

It will not make any difference in the right of a purchaser, with notice of a prior settlement, to the benefit of the statute, that he has not obtained a conveyance from the husband, and is obliged to come into equity to compel [*456] performance of his contract, for the statute must receive the same construction and produce the same effect in equity as at law; and as the settlement, according to the construction which the statute has received, is a fraudulent devise to cheat subsequent purchasers, there is nothing unconscientious in the purchaser entering into a treaty for purchase with knowledge of the settlement. The Court, therefore, will decree performance of the contract of sale at the instance of the purchaser, as was done in *Buckle v. Mitchell*,^(k) where the decree was made against the trustees of the settlement, in whom the legal estate was vested.

In *Chapman v. Emery*,^(l) a mortgagee, by legal mortgage from the hus-

(h) *Gardiner v. Painter*, Ca. temp. King, 65; *Chapman v. Emery*, Cowp. 280; *Eveleyn v. Templar*, 2 Bro. C. C. 148.

(i) 18 Ves. 110.

(k) 18 Ves. 100.

(l) Cowp. 280.

band, was treated as a purchaser entitled to the benefit of the statute. This was refused by a court of law, in *Kerrison v. Dorrien*,^(m) to an equitable mortgagee by deposit of title-deeds, with an observation that the deposit might entitle the party in equity to demand a conveyance, but he could not be considered, in the language of the statute, to be a purchaser in fee-simple, or fee-tail, for life, or lives, or years. But in *Lister v. Turner*,⁽ⁿ⁾ Sir J. Wigram, V. C., gave an equitable mortgagee by deposit of deeds, the benefit of the statute, observing, that *Buckle v. Mitchell*, which was the case of a purchaser who had paid part of his price without obtaining a conveyance, was a direct authority that a person, having an equitable interest in land entitled to clothe it with the legal estate, was a purchaser within the statute.^(o)

As a voluntary settlement is void against a subsequent purchaser for valuable consideration, even although he might have had notice of the settlement previous to his purchase, it was supposed that the consequences of this might be saved by those interested under the settlement obtaining an injunction against the husband to restrain him *from selling; but in *Pulvertoft v. Pulvertoft*,^(p) Lord Eldon, grounding himself upon the [*457] refusal of Lord Thurlow, in *Evelyn v. Templar*, to compel a purchaser from the husband to pay over again to the trustees of the settlement the price of his purchase, which he had paid to the husband with knowledge of the settlement, and of a covenant in it, that, if the husband did sell, he should pay the price to the trustees, to be invested by them, as shewing Lord Thurlow's opinion to be, that, with a merely voluntary settlement, the Court had nothing to do, refused to grant such an injunction, or rather, he recalled an injunction he had previously granted on first impression, although in a subsequent branch of the same case he overruled a demurrer to the bill, which, in addition to an injunction, prayed that the settlement, as having created a trust for those interested, might be established and carried into execution, observing, that the Court would not stop because the estate and trust created might at some period be destroyed by a conveyance for valuable consideration.

On the other hand, while the Court will not lend its assistance *to restrain* the husband from defeating his voluntary settlement, so, neither will it lend the husband its aid to defeat it. If, therefore, a purchaser from the husband refuse to complete his purchase, by reason of a prior voluntary settlement, the Court will not decree him to perform. The purchaser is alone within the contemplation of the statute, and, if he repudiate its assistance, there is no one who is an object of its provisions, and the settlement, being a nullity only as against the purchaser, remains good as between the husband and those entitled under it; and they, being volunteers, the Court as to them remains neuter.^(q) In *Johnson v. Legard*,^(r) Lord Eldon dismissed a bill, at the instance of creditors of the husband, seeking to enforce a sale against *a purchaser, who was willing to complete his purchase if a title could be made, with this observation, that one consideration [*458]

(m) 9 Bing. 76.

(n) 15 L. J., N. S., pt. 7, p. 336.

(o) See also *Ede v. Knowles*, 2 Y. & C. C. C. 173.

(p) 18 Ves. 93.

(q) *Smith v. Garland*, 2 Mer. 123.

(r) T. & R. 281.

was, that the husband had no equity to defeat the act which he had done himself; but another consideration which had weighed was, that the Court could not be quite sure that there might not have been some intermediate acts, which, by matter *ex post facto*, may have made the settlement good, which, in its origin, was not good.

This leads to the consideration of what those matters are to which Lord Eldon here referred, and how far they may take a settlement, originally void under the statute, out of its provisions. If a portion be paid in consideration of the settlement, that will make the settlement equal to one executed before marriage.^(s) Nay, if an agreement to pay money be given as the consideration, it will support the settlement,^(t) or if the settlement be substituted for one made prior to marriage.^(u) In the case last cited, the lands in the settlement *after* marriage, given for the jointure of the wife, were nearly double the value of those in the settlement *prior* to marriage. Nay, further, if the settlement be made in consequence of the refusal of trustees, in whom money of the wife was vested, to pay the money over to the husband unless he would execute it, no proper provision having been made for the wife prior to marriage, that equally will support the settlement.^(v) In short, it would seem, that, if a valuable consideration, of what nature soever, be given by the friends of the wife, or any one in her behalf, for the settlement, that will make it equally good as if it had been granted prior to marriage, and the Court will not weigh nicely the comparative value of the relative considerations, but will be satisfied to support the settlement [^{*459}] *after* marriage, if the agreement appear to be fair and honest. But if the benefit given to the wife be unreasonable, the Court will modify it. Thus, where the wife joined in a mortgage with her husband, and levied a fine to bar her dower, in consideration of the husband agreeing that she should have the redemption of the mortgage, the Court treated this as fraudulent against subsequent mortgagees of the husband, but decreed that she should enjoy her dower if she survived.^(w)

The disposition of the court to sustain a fair and honest settlement, upon almost any consideration, will be further apparent from a perusal of those cases which have arisen under the statute, in regard to benefits given by the settlement to collateral relations,^(x) and upon other deeds than marriage settlements.^(y)

(s) *Colvile v. Parker*, Cro. Jac. 158; *Ramsden v. Hilton*, 2 Ves. sen. 308; *Stileman v. Ashdown*, 2 Atk. 479; *Jones v. Marsh*, Ca. temp. Talb. 64.

(t) *Brown v. Jones*, 1 Atk. 189.

(u) *Scott v. Bell*, 2 Lev. 70; *Clerk v. Nettleship*, Id. 148.

(v) *Brown v. Jones*, *ubi supra*.

(w) *Dolin v. Coltman*, 1 Vern. 294.

(x) *Roe v. Mitton*, 2 Wils. 356.

(y) *Myddleton v. Kenyon*, 2 Ves. jun. 410; *Hill v. Exeter*, 2 Taunt. 69.

CHAPTER IV.

SETTLEMENTS MADE BY THE HUSBAND UPON THE WIFE AFTER MARRIAGE,
FOR VALUABLE CONSIDERATION GIVEN BY THE WIFE OR HER FRIENDS.

It was observed,(a) that the validity of a settlement made by the husband upon the wife, after marriage, as in a question with the creditors of, or purchasers from, the husband, depended upon whether the settlement was made gratuitously by the husband, or for valuable consideration received by him in some shape or other. And it has been already shown(b) what are to be considered voluntary or *gratuitous settlements, and that settlements having that character are absolutely bad as against purchasers from the husband for valuable consideration, and open to challenge at the instance of his creditors. It now remains to consider the validity of a settlement made by the husband upon the wife after marriage, in return for valuable consideration received by him from the wife or from others on her behalf. [*460]

The consideration which will support a settlement made after marriage, may be given either by the wife herself or by some other person on her behalf.

§ 1.—*The Consideration given by the Wife herself, sufficient to support a Settlement after Marriage.*

If the wife renounce any right or interest which she has independently of the husband, or which he cannot, by his marital right, take without her consent, that will form a consideration flowing from her, sufficient to support a settlement made upon her by the husband. In *Ward v. Shallet*,(c) the wife, with the privity and consent of her friends, renounced a contingent interest which she had in a bond given to her by the husband at their marriage, in consideration of the husband settling upon her and her children part of her property which, by the marriage, he took in her right, and the settlement so made was supported against the creditors of the husband. Where, also, the wife enabled the husband to sell lands, out of which she held a jointure given to her before marriage, and the husband settled upon her other lands so soon afterwards as to connect the two transactions, the second settlement was presumed to have been given in consideration of the renunciation of the first, and was sustained against the creditors of the husband.(d) *According to the opinion of Lord Eldon, in *Arundell v. Phipps*,(e)—a case which never came to judgment,— [*461] if a married woman were to purchase from her husband, with the proceeds

(a) Ante, p. 437, et seq.

(d) *Scott v. Bell*, 2 Lev. 70.

(b) Ante, p. 441, 442.

(e) 10 Ves. 140.

(c) 2 Ves. sen. 16.

of her separate property, a settlement of chattels in trust for her, the settlement would be good against the creditors of the husband, although the chattels (paintings and drawings) should have remained in the house occupied by the husband and wife.^(f) In *Cottle v. Fripp*,^(g) a bond for the settlement of an annuity upon a wife and her children, given by the husband to a trustee for her, in consideration of her levying a fine to bar her jointure, payable out of an impropriate rectory, was sustained against the creditors of the husband. And in *Lavender v. Blakstone*,^(h) Hale, C. J., said, that if the wife had joined in a fine levied by her husband, so as to have barred her dower, this might have made the settlement after marriage to be upon good consideration.

§ 2.—*What Consideration given by the Friends of the Wife will support a Settlement upon her against the Husband's Creditors.*

Consideration given or well secured by the father of the wife or her friends to the husband, for a settlement upon the wife, will sustain the settlement. In *Brown v. Jones*,⁽ⁱ⁾ the wife's brother had agreed to pay the husband £1000, and had paid him £600 of it: a settlement by the husband of an estate upon the wife was sustained against the creditors of the husband; and, in *Hilton v. Biscoe*,^(k) the settlement was made in consideration of the wife's father and grandmother having "paid, agreed, and secured to pay" £2000 to the husband. The settlement was sustained [*462] *against creditors, though resting only in covenant to stand seised.

So, also, if there should be property of the wife in the hands of third parties, which the husband would be entitled to take in her right, but which they refuse to pay him unless he will make a settlement upon the wife, a settlement, made in such circumstances, will be held to have been made for valuable consideration, and be good against the husband's creditors. In *Middlecome v. Marlow*,^(l) the executors of the wife's father, by deed after marriage, agreed with the husband that £500, the residuary estate of the father, should be settled upon the wife to her separate use for life, and, after her death, to the issue of the marriage. Lord Hardwicke held, that the agreement was good to entitle the executors to be admitted as creditors in the bankruptcy of the husband for the £500, which they had lent to him. In *Moor v. Rycault*,^(m) the wife was entitled to a portion, which the trustees, by whom it was payable, refused to pay to the husband, unless he would make a settlement of it upon the wife, which the husband accordingly did, and the settlement was decreed to be good against his creditors; because, if the husband had sued the trustees, the Court would have decreed him to make some such settlement. In *Wheeler v. Caryl*,⁽ⁿ⁾ the wife was entitled to £6000, liable to be reduced on coming into esse of another daughter of her parents, of which at the time there was no proba-

(f) See also *Simmons v. Edwards*, 16 M. & W. 838.

(h) 2 Lev. 146.

(l) 2 Atk. 518.

(i) 1 Atk. 187.

(m) Pre. in Ch. 22.

(g) 2 Vern. 220.

(k) 2 Ves. sen. 304.

(n) Amb. 121.

bility. The father of the wife agreed to secure this portion upon his lands, in consideration of a settlement, made by the husband upon the wife. The Chancellor said, if the money had been raised and paid in the lifetime of the father, and the settlement made in consideration of it, it would have been good, and he sustained it as good against the husband's creditors.

*Where the settlement after marriage has been made under the authority of the Court, which, it has elsewhere been observed, will [*463] not lend its aid to the husband to recover the wife's estate, unless upon the condition of making a settlement upon her, there is necessarily an absence of any imputation of fraud against such a settlement. In *Moor v. Rycault*, and *Wheeler v. Caryl*, the Chancellor said, that the Court would support such a settlement as good against creditors.(o)

It has been an objection raised to settlements made after marriage, for consideration received from the wife, or from others on her behalf, that the consideration was not adequate to the benefit given by the settlement. This objection will not prevail, unless the disproportion is so great as to raise a presumption of fraud upon creditors.(p) In *Scott v. Bell*,(q) it did not prevail, although the lands in the second settlement were double the value of those in the first settlement, which was renounced. In *Middlecome v. Marlow*,(r) Lord Hardwicke said, "The Court never weighs nicely what will be the particular advantage on the one side or the other, under a settlement, if it is just in general."

*CHAPTER V.

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OF THE SETTLEMENT TO BE MADE UNDER 4 GEO. 4, C. 76, WHERE MARRIAGE HAS BEEN CELEBRATED IN CONTRAVENTION OF THAT STATUTE, AS TO AGE, AND CONSENT OF PARENTS OR GUARDIANS.

By the Marriage Act,(a) it is enacted, that, if any marriage, solemnised by license, shall be procured by a party to the marriage, to be solemnised between persons, either of whom shall be under twenty-one years of age, not being a widow or widower, by means of falsely, and wilfully, and knowingly, swearing to any matter to which the party is required by the act to swear; or, if any marriage by banns shall be procured by a party thereto, to be solemnised by banns between persons, either of whom shall be under twenty-one years of age, not being a widower or widow, the party knowing that such persons under age had a parent or guardian, and that banns had not been duly published according to the act, and having knowingly procured the undue publication of banns; in either of these cases the Attorney-General may, by information, at the relation of the parent or guardian

(o) See *Simson v. Jones*, 2 Russ. & My. 365, as to the effect given to the circumstance of the settlement having been made under the authority of the Court.

(p) *Ward v. Shallet*, 2 Ves. sen. 18; see also *Jones v. Marsh*, Ca. temp. Talb. 64.

(q) 2 Lev. 71.

(r) 2 Atk. 520.

(a) 4 Geo. 4, c. 76.

of the minor, whose consent has not been given to such marriage, sue for a forfeiture of all estate, right, title, and interest, in any property accrued to the party so offending by force of such marriage; and the Court shall have power to declare such forfeiture, and thereupon to order and direct that all such estate, right, title, and interest, in any property as shall then have accrued or shall thereafter accrue to such offending party, by force of such [*465] marriage, shall be secured, under the direction of the *Court, for the benefit of the innocent party, or of the issue of the marriage, or of any of them, in such manner as the Court shall think fit, for the purpose of preventing the offending party from deriving any interest in real or personal estate or pecuniary benefits from such marriage. If both parties to the marriage offend, then the settlement is to be for the benefit of the issue of the marriage, subject to a provision for maintenance of the offending parties.

In *The Attorney-General v. Mulla*,^(b) Sir J. Leach, M. R., was of opinion, that, if the circumstances brought the case within the statute, the Court must declare the forfeiture enacted, and had no power to mitigate the penalty. In *Attorney-General v. Lucas*,^(c) Lord Cottenham held, that, while the statute took from the husband everything that he could have under the marriage, and provided that he should not derive benefit in any other manner, this meant "to the injury of the other parties;" for the settlement to be made was to be for the interest of the innocent party of the issue of the marriage, and it might be to the injury of the wife herself (about to die without issue,) to be prevented from giving her husband surviving anything. He therefore, declared, that, if the wife survived, she should have power to appoint one-third of her property, by will or by deed, to take effect after her death; and that, if there should be no issue, the wife should have power to appoint the whole by will or by deed, to take effect after her death.

At a subsequent stage of *The Attorney-General v. Mulla*, to that before mentioned,^(d) Lord Langdale ruled, that he had no power under the statute to modify a settlement prepared at the view of the Master, so as to provide for issue of a subsequent marriage. But in *Attorney-General v. Lucas*, Lord Cottenham, C., said, that, on the wife becoming a widow, she should have power to provide for a second marriage: he did not see that could be objected to.

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CHAPTER VI.

OF THE PROVISION FOR THE WIFE'S PERSONAL COMFORT AND ORNAMENT,
MADE BEFORE OR AFTER MARRIAGE, AND KNOWN TECHNICALLY AS "PIN-
MONEY."

As the law recognises in husband and wife only one person, it will not take any cognizance of any gift from the husband to the wife, made during

(b) 4 Russ. 329.

(c) 12 Jur. 1011.

(d) 7 Beav. 351.

marriage, to be enjoyed during the coverture. But such a gift will receive effect in equity where it is for the personal comfort or ornament of the wife, and is not so unreasonable in its nature as in *Beard v. Beard*,^(a) where it amounted to a gift, not only of the whole property which the husband was possessed of at the time, but which he might afterwards acquire.

Gifts of this nature, which may either be agreed upon before marriage, or be given from time to time, are known technically under the term "pin-money." If they are agreed upon before marriage, they will then be good to the wife against the creditors of the husband, as was shewn before.^(b)

In *Fowler v. Fowler*,^(c) it was said, by Lord Talbot, that if, notwithstanding a provision for pin-money, the husband has supplied the wife "with clothes and other necessaries," this will be a bar to any claim for arrears of pin-money during the period he so supplied her. If "clothes and other necessaries" were the exact terms used, there seems reason to doubt the value of this dictum, inasmuch as pin-money is not intended for these purposes, but rather for "fanciful" than "necessary" expenditure, at least, in the ordinary legal *sense of the word necessary; for, though jewels and other ornaments may, in some respects, be necessary to [467] certain stations in life, they do not, in legal parlance, come within the category of "necessaries."

Where the wife makes a claim for arrears of pin-money, the Court does not carry the account further back than one year; for the object of the gift is, that the wife, without the necessity of coming to the husband on every occasion, may have it in her power to clothe and ornament herself suitably to the rank and station of the husband, and that the provision for this purpose may be spent *de die in diem*.^(d) If, therefore, there be an arrear, it is inferred that the wife, having lived with him, has had furnished to her by the husband himself that which pin-money was intended to procure;^(e) for, not to presume this, might work a great hardship to the husband, who in all probability may have lived in a more plentiful manner than he would have done, had he known that he would have to pay the pin-money in addition to what he may have contributed for the wife's personal expenses.^(f) Where this presumption is negatived by the fact that the wife, during the period of the arrear, lived separate from the husband, without having any allowance from him,^(g) or that, living with him, she had frequently required payment, and been promised that she should have it, the Court will decree the account as far back as the arrears go.^(h) The presumption will not be negatived by the fact of the wife's insanity, upon the ground that it precludes the presumption of a gift from her to the husband, from her inability to give consent to the husband taking the money; for a lunatic is equally *capable with a person of sane mind of receiving the benefit of the expenditure, which, where there is an arrear of pin-money, it is pre- [468] sumed the husband has himself made for the wife's benefit.⁽ⁱ⁾

(a) 3 Atk. 72.

(b) Vide ante, p. 425, et seq.

(c) 3 P. Wms. 355.

(d) *Howard v. Digby*, 8 Bligh, N.C. 246.

(e) *Thomas v. Bennett*, 2 P. Wms. 340; *Aston v. Aston*, 1 Ves. sen. 267; *Peacock v. Monk*, 2 Id. 190.

(f) *Powell v. Hankey*, 2 P. Wms. 83.

(g) *Aston v. Aston*, ubi supra.

(h) *Ridout v. Lewis*, 1 Atk. 268; *Aston v. Aston*, ubi supra.

(i) *Howard v. Digby*, 8 Bligh, 224.

If the husband have left the wife a legacy equal to or greater in amount than the arrears claimed, that also will be an answer to the claim, upon the rule applicable to all cases where a legacy is left to a creditor, that the debt of pin-money was intended by the husband to be satisfied by the legacy.(k)

Elopement from the husband, without adultery, will not deprive the wife of her right to enforce a provision for pin-money;(l) neither will elopement with adultery, for although it would bar her claim to dower, yet that is by special statute,(m) which is confined to dower; and the Courts have not felt themselves at liberty to deny to the wife, on this ground, the enforcement of those rights which, by agreement, have been secured to her,(n) even where this has only been by articles, never reduced into the form of a settlement.(o)

Where the gift of pin-money has been in the form of allowing the wife to receive the profits of certain small articles, as of butter, fruit, fowls, eggs, and the like, in a farm,(p) or of giving the wife a certain sum wherewith to defray the household expenses, and allowing her to retain to her own use whatever she might be able to save out of the sum after doing this;(q) in [*469] either of these cases, the *savings of the wife will be recognised in a court of equity as the property of the wife, in questions between her and the representatives of the husband, so long, at least, as this does not interfere with the payment of the husband's debts.(r) But a clear unequivocal act of the husband is necessary to support a claim by the wife in this respect.(s) In *Slanning v. Style*, the circumstance of the husband having *borrowed* from the wife part of her savings, in order to make up a sum he had to pay, was held, by Lord Talbot, to be sufficient evidence to show the husband's consent that the wife should have a separate property in the savings, and to sustain her claim for payment of the sum borrowed out of the husband's assets.

If the allowance given by the husband for pin-money, or separate maintenance, has been so ample as to enable the wife to accumulate savings out of it, these, with whatever she may have purchased with them, will be at her own disposal, by will or otherwise.(t) On the other hand, if the allowance given by the husband for supplying his general domestic expenses has been so ample as to have been more than sufficient for that purpose, any savings the wife may have accumulated from this source will belong to the husband.(u)

(k) *Fowler v. Fowler*, 3 P. Wms. 355.

(l) *Moore v. Moore*, 1 Atk. 272.

(m) *Westminster* 2, c. 24.

(n) *Blount v. Winter*, 3 P. Wms. 276, n.; *Field v. Serres*, 1 B. & P., N. R. 121.

(o) *Sidney v. Sidney*, 3 P. Wms. 269. But see *contra*, *Lee v. Lee*, *Dick*, 321; *More v. Scarboro*, 2 Eq. Ca. Abr. 156.

(p) *Slanning v. Style*, 3 P. Wms. 337.

(q) *Stanway v. Stiles*, 2 Eq. Ca. Abr. 156, marg.; *Calmady v. Calmady*, Id.

(r) *Slanning v. Style*, 3 P. Wms. 338; *Lady Tirrell's case*, 2 Eq. Ca. Abr. 155.

(s) *M'Lean v. Longlands*, 5 Ves. 79; *Waller v. Hodge*, 2 Swanst. 92.

(t) *Neal's case*, in *Herbert*, Pre. in Ch. 44.

(u) *Tyrell's case*, *Freem. Ch. Ca.* 304.

*BOOK III.

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RIGHTS ARISING TO HUSBAND AND WIFE UNDER GIFTS INTER SE OR FROM THIRD PARTIES.

As a consequence of the unity of person between husband and wife, which has already been adverted to, neither the husband nor the wife can, with the exceptions to be noticed presently, grant, the one to the other, an estate in possession, reversion, or remainder, to take effect in possession during the coverture ;(a) but a devise by *the husband to the wife* will be good, as that cannot take effect until *after* the coverture.(b) A devise by *the wife to the husband*, however will be void by reason of her disability at the time of making it, as sub potestate viri.(c) So, a gift by the husband to the wife mortis causâ will be good, for such gift is not presently his to whom it is given, but only in case the donor die, and till then is revocable.(d) Upon the same principle, apparently, the purchase of a walk in a chase by a husband, under a patent to himself and his wife and another, for their lives, and the life of the longest liver, was, after the death of the husband, sustained as a provision to the wife.(e)

There are, however, certain exceptions to the doctrine that one spouse cannot, during the coverture, grant an estate to the other. By the custom of York a husband may grant to his wife lands acquired by him by purchase.

Another exception is accomplished by the operation of the 27 Hen. 8, c. 10. A feoffment or other conveyance to third parties to the use of the wife, will pass the legal estate *to the feoffee, and in his hands the statute operates upon the use to convert it into the legal estate.(f) In [*471] this way, by the momentary transference of the legal estate to the feoffee, the common law, that a wife cannot take a gift of land from her husband, is evaded. A covenant by the husband with third parties to stand seised to the use of the wife, will also be effectual to the wife under the terms of the statute. A covenant to the same effect with the wife herself will obviously be bad.(g)

Another exception is in regard to copyholds. Although a husband cannot grant a copyhold to his wife, nor she to him, they being but one person in law,(h) yet the husband and wife (if the custom authorise her to surrender) may surrender a copyhold, the one *to the use* of the other; because, as was said in speaking of a surrender by a husband to the use of the wife, "the husband doth not make it immediately to the wife, but by two means, viz., by surrender to the lord, and by admittance of the lord to the wife."(i)

Another *class* of exceptions to the rule that a husband cannot make a

(a) Litt. sect. 168.

(c) Ibid.

(e) *Kingdome v. Bridges*, 2 Vern. 67.

(g) Ibid.

(h) *Firebrass v. Pennant*, 2 Wils. 255.

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(b) Co. Litt. 112, b.

(d) *Walter v. Hodge*, 2 Swanst. 92.

(f) Co. Litt. 112, a.

(i) *Lepingwell v. Bunting*, 4 Inst. 29, b.

gift of lands to his wife, if in truth they are exceptions, and are not rather branches of the rule that *donatio mortis causâ* from husband to wife is good, are those cases in which a husband takes the title to property to himself and his wife conjointly, and in which no question arises on 13 Eliz. c. 7, and 1 Jac. 1, c. 15.. In these cases the transaction has been treated as an advancement and provision for the wife. This was so held in the case of a purchase of land by a husband, taken by a conveyance to himself and his wife and a third party, for their lives and that of the longest liver, although the [*472] question arose with the creditors of the husband.(*k*) In the case of *bonds and mortgages taken by a husband to himself and his wife, where the question arose with the heir-at-law, the wife was held entitled to them by survivorship.(*l*) In the case, however, of a purchase by a husband of a term for years, to himself and his wife and the survivor, and the executors, administrators, and assigns of the survivor, and of a subsequent mortgage of the term by the husband alone, with a proviso for redemption by the husband or wife, or their executors or administrators, it was held, after the death of the husband, that the equity of redemption was assets for payment of his debts.(*m*) The authority of this case is, however, questionable on several grounds (see note, p. 365, P. Wms.) Where a husband paid off part of a debt due upon a mortgage of his wife's leasehold estate, in the notion that, under the transfer of the mortgage, made by him along with his wife, containing a proviso for redemption by him or her, he had become the owner of the mortgage, the executor of the husband was allowed to stand in the place of the mortgagee for the sums paid off.(*n*)

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*BOOK IV.

OF PROPERTY SETTLED OR GIVEN TO BE ENJOYED BY THE
WIFE AS SEPARATE ESTATE.

CHAPTER I.

WHAT FORM OF SETTLEMENT OR GIFT WILL CREATE A SEPARATE ESTATE IN
THE WIFE.

ALTHOUGH the personal property of the wife, and the annual profits of her real estate, become, by the marriage, vested in her husband, where there

(*k*) *Kingdome v. Bridges*, 2 Vern. 67; *Back v. Andrews*, Id. 120.(*l*) *Christ's Hospital v. Budgin*, 2 Vern. 683.(*m*) *Watts v. Thomas*, 2 P. Wms. 364.(*n*) *Pitt v. Pitt*, T. & R. 180.

is no arrangement to the contrary, either in the deeds of gift by which she acquires the property, or in her settlement on marriage, yet where there is such an arrangement, giving the wife the enjoyment either of personal or real estate, separate from her husband, courts of equity, and even courts of law (a) recognise as valid this infringement upon the ancient common law, which did not permit the enjoyment by the wife of any property independent of the husband.

Where it is the intention to give the wife the separate enjoyment of property, the more obvious and expedient course is to vest the property, whether real or personal, in trustees for that purpose; but this course is not indispensably necessary; for, where the gift is direct to the wife, so that, according to the rule of law, the husband would be the hand to receive, yet, if the intention that the enjoyment of the gift should be by the wife, independently of the husband, be obvious, the Courts will [*474] effectuate the intention by treating the husband as a trustee for her. If lands, therefore, be devised to the wife for her separate enjoyment, although the husband may, in her right be entitled to draw the rents and profits, yet it will be as a trustee for her. (b) So, if personal property be given in the same way, the husband will hold it as trustee, although, in the case of stock, for instance, it may have been transferred to the husband, and have remained vested in him for a considerable period, so long as there is an absence of any evidence to shew that the transfer was made with the consent of the wife as a gift to the husband; (c) so, also, whether the property consists of personal chattels, as furniture, which the husband has had the enjoyment of together with the wife. (d)

The trust in the husband will attach, not only upon the property originally given to the wife's separate use, but upon such property as she may have purchased with her savings out of the income of the separate estate; (e) at least this seems to be deducible from the nature of the inquiry involved in the case referred to, which would not otherwise be intelligible. It is hardly necessary to say, that, if the husband is treated as a trustee for the wife, where the property is given to her herself for her separate enjoyment, multo fortiori will he be treated as such where the gift is to himself for the wife, and the terms of the gift shew that the nature of the wife's enjoyment was intended to be independent of him. (f)

As already noticed, every agreement upon marriage must be reduced into writing in order to be effectual against creditors. If, therefore, an agreement in writing have been made before marriage for a settlement of any part of the wife's property to her separate use, should the marriage have taken place without such a settlement having been executed, and the estate have thereby become legally vested in the husband, the Courts of equity will nevertheless treat him as a trustee for the wife. (g) When a settlement has actually been executed, but from internal evidence, its frame is defective for giving the wife that separate enjoyment which such evidence shews it was intended she should have, the Courts, as in other instances of

(a) *Davison v. Atkinson*, 5 T. R. 434.

(b) *Bennet v. Davis*, 2 P. Wms. 316.

(c) *Rich v. Cockell*, 9 Ves. 375.

(d) *Newlands v. Paynter*, 4 My. & Cr. 408; *Simmons v. Edwards*, 16 M. & W. 838.

(e) *Newlands v. Paynter*, ubi supra.

(f) *Darley v. Darley*, 3 Atk. 399.

(g) 2 Roper, 156.

defective settlement, will reform the settlement, so as to accomplish the object intended.

If it be ascertained, that there is a trust in the husband for the separate use of the wife, then the trust draws after it all the consequences in regard to the acts of the husband which attach to such a character. Thus, renewals of leases obtained by the husband will be considered as having been obtained by him for the benefit of the wife,^(h) and all persons dealing with him, with notice of the title under which he holds, will be affected with the trust.⁽ⁱ⁾ Not only so, but the property will be safe from the legal execution of the creditors of the husband.^(k)

In order to raise a trust in the husband for the separate use of the wife, it is not necessary that any particular form of words should have been used. It is sufficient, in the words of Lord Brougham, that a clear intention is manifested by the testator that the rights of the husband at law should be excluded. What words will manifest that intention must, therefore, be the subject of decision in every case as it may arise. In such a state of the law, all that can be done to assist the reader is to give the expressions which [*476] *have been adjudicated upon, distinguishing the cases in which the expressions used have been held to create a separate estate, from those in which they have been held not to have that effect.

In endeavouring to discover the intention of the deed or will, in regard to the exclusion of the husband's rights, the Court will not, as it seems, look at the context, but will confine itself to the terms of the particular gift or limitation. In *Tyler v. Lake*,^(l) Lord Brougham said, "If a sufficient strength of negative words is not to be found in the gift or limitation, you are not allowed to fish about for indications of intention from other parts of the instrument;" and, in *Massey v. Parker*,^(m) Sir Christopher Pepys, M. R., said, "In neither *Tyler v. Lake*, nor *Stanton v. Hall*,⁽ⁿ⁾ did the claim of the wife prevail, although in *Stanton v. Hall* the whole machinery of the instrument proved that such must have been the intention, but the required words of exclusion were wanting." In *Blacklow v. Laws*,^(o) Sir James Wigram, V. C., felt himself constrained to follow these cases as authorities, while, at the same time, he expressed some dissent to the opinions of Lord Brougham and Sir Christopher Pepys, as importing a stronger protection of the marital right than was applicable to any other right of property—"for, with the exception of a few technical words, ('heir,' or 'exchange,' for example,) in a deed, courts of justice invariably affirm the proposition, that an intended gift shall take effect, provided the Court can find in the instrument a declared intention to give, although the simple words of limitation, unaided by implication, arising out of other parts of the instrument, might leave the intention uncertain." The result, therefore, seems to be, that, in ascertaining whether the husband's rights are to be excluded, and a separate estate conferred upon the wife, the Court will [*477] not regard *the context or general import of the instrument, but will confine itself to an examination of the particular terms of the gift or limitation, and require from it an express exclusion.

(h) *Parker v. Brooke*, 9 Ves. 583.

(i) *Id.* 587.

(k) *Bennet v. Davis*, 2 P. Wms. 318; *Newlands v. Paynter*, 4 My. & Cr. 408.

(l) 2 Russ. & My. 183.

(m) 2 My. & K. 174.

(n) 2 Russ. & My. 175.

(o) 2 Hare, 49.

With regard to the terms of the gift or limitation, which will be sufficient to create a separate estate in the wife, if this is to be done by deed, care must be taken that such terms are not used, as, instead of creating a trust, will give a legal estate to the wife under the Statute of Uses. Thus, in *Williams v. Waters*,^(p) a conveyance by the wife, by settlement upon marriage, in the form of lease and release, to third parties, "in trust" for the wife "and her assigns for her life, for her own sole and separate use," independent, &c., of her husband, was held to vest a legal estate in the wife, there being no words giving an active trust to the re-leasees.

Assuming any question of this kind to have been avoided, then, as before observed, no particular form of words is necessary, in order to create a separate estate in the wife, to the exclusion of the husband. If from those used, the intention to give an enjoyment to the wife, independently of the husband, is plainly discoverable, that will be sufficient. The terms, "to the wife's sole and separate use and benefit," will be sufficient for this purpose,^(q) or "her own sole use and benefit."^(r) In *Tyrrell v. Hope*,^(s) an agreement by the husband that the wife should "enjoy and receive the issue and profits," &c., was held by Lord Hardwicke to create a separate estate; "for," as his Lordship said, "to what end should she receive it, if it is the property of the husband the next moment? The word 'enjoy,' too, is very strong to imply a separate use to the wife." In *Lee v. Prieaux*,^(t) Lord Thurlow held a legacy to two women, the one single and the other married, with *a declaration that the executors "should not be troubled to see to the application, but their receipts in writing [*478] respectively shall be a sufficient discharge," to be given to the separate use of the legatees, because the words showed a clear intent that the married woman, "though married, should have the power to give a discharge, so as to bar her husband." In *Woodman v. Horsley*,^(u) Sir T. Sewell, M. R., held, that the words, "the wife's receipt shall be a sufficient discharge, notwithstanding her coverture," shewed an intention to create a separate estate. In *Johnes v. Lockhart*,^(v) a legacy of residue to a husband and wife, with a direction that the husband "should not sell the same without the consent" of the wife, was held to be a gift to the separate use of the wife. In *Hartley v. Hurle*,^(w) Lord Alvanley, M. R., said, obiter, that a direction to pay a legacy "into the proper hands" of a married woman, made the gift to her sole and separate use; but, in *Tyler v. Lake*,^(x) Lord Brougham noticed this opinion in terms almost implying disapproval. In *Dixon v. Olmius*,^(y) a legacy was given to a married woman of a bond and mortgage debt, "to be delivered up to her whenever she should demand or require the same;" and Lord Loughborough held, that they were given to her separate use, as the husband could not have obtained the securities without a demand from the wife, which gives her the *dominion* over them. In *Prichard v. Ames*,^(z) Graham, B., held a legacy to a married woman, "for her own use and at her own disposal," to be given to her separate use; for, if the words, "at her own disposal," meant nothing more

(p) 14 M. & W. 166.

(r) *Adamson v. Armitage*, 19 Ves. 416.

(t) 3 Bro. C. C. 383.

(v) 3 Bro. C. C. 383, n.

(x) 2 Russ. & My. 188.

(z) 1 Turn. 222.

(q) *Ex parte Ray*, 1 Madd. 199.

(s) 2 Atk. 558.

(u) Colchester MS.

(w) 5 Ves. 540.

(y) 2 Cox. 414.

than "for her own use," they would require to be altogether rejected. In *Margetts v. Barringer*,^(a) a bequest to a married woman for her own use and benefit, independent of any other person, was held *to create a [*479] separate estate. In *Steedman v. Poole*,^(b) Sir J. Wigram, V. C., held, that a bequest to a woman already married, "for her whole and sole use," free from the control of any *future* husband, was a gift to separate use during the life of a *present* husband; and, in *Inglefield v. Coghlan*,^(c) a bequest, "solely and entirely for her own use and benefit," was held by Sir J. K. Bruce, V. C., to create a separate use. In *Jacobs v. Amyatt*,^(d) where money was given to an unmarried woman, to be placed at interest until her age of twenty-one or marriage, and then the whole, with the accumulations, was to be paid to her, "to and for her use during her life," the Court directed the interest to be paid to the wife for her separate use; but the reasons of this judgment do not appear.

In *Ex parte Killick*,^(e) a house, with the furniture in it, was given by will to a married woman, for her own sole use and benefit, with a subsequent declaration that the house, and the rents, issues, and profits of it, without mention of the furniture, should not be liable to the debts, contracts, or engagements of her husband. Sir J. K. Bruce, V. C., held, that this declaration did not alter the nature of the gift as to the furniture, and that both it and the house were given to the separate estate of the wife. In *Day v. Croft*,^(f) Lord Langdale, M. R., held, that a legacy given by codicil, "in addition" to one by the will, which was to separate use, was also to separate use.

On the other hand, where there are no words expressly excluding the husband's right, he will take that right which the law gives him in the property of the wife. Accordingly, in *Brown v. Clark*,^(g) where there was a bequest to a married woman of the *interest* of residuary estate, with a direction that at her death the *principal* should be divided equally *among [*480] her children, "the husband by no means to have any part whatever," Lord Loughborough determined that the husband was not deprived of that right in the *interest* which the law gave him in the wife's property. In *Johnes v. Lockhart*, a gift to a married woman "for her own use and benefit," was held not to create a separate estate.

In *Stanton v. Hall*,^(h) the testator devised messuages upon trust to pay the rents to his son "for his own use and benefit," but so as they should not be liable for his debts; and, in case of his bankruptcy or insolvency, out of the rents to pay an annuity of £100 to the wife of his son, the annuity to be paid to her or her assigns for the term of his son's life, and, after his death, upon trust to pay an annuity of £80 to her and her assigns. The son having become insolvent, his wife claimed the annuity of £100 to her separate use, as the limitation to her was in opposition and contradistinction to her husband, from whom the subject-matter was expressly taken away previous to the gift to her. But Lord Brougham held, that nothing

(a) 6 Hare, 193.

(b) *Ibid.*

(c) 2 Coll. 247.

(d) See note to *Beresford v. Hobson*, 1 Madd. 376.

(e) 3 Mont., Dea. & De G. 480.

(f) 4 Beav. 561.

(g) 3 Ves. 166.

(h) 2 Russ. & My. 175.

appeared upon the language or limitations of the will, from which a manifest implication that the marital right was to be excluded could be drawn.

In *Tyler v. Lake*,⁽ⁱ⁾ the testatrix conveyed estates upon trust, for sale and division of the proceeds after her death among her sons and daughters, two of the latter of whom were married women; and, as to their shares, she directed the same to be paid "into their own proper and respective hands, to and for their own respective use and benefit;" and in case they should be dead at the time of distribution, she directed their shares to be paid to their respective husbands, "to and for their own respective use and benefit absolutely." The shares of four unmarried daughters were directed to be invested in the funds, and the dividends paid to them, "to and for their own proper and respective use and benefit;" *and the share of one [481] of the sons was directed to be held by the trustees until a specified time, and then to be paid to him "to and for his own use and benefit." In a question between one of the two married daughters and the assignees in bankruptcy of her husband, Lord Brougham held, that neither the word "own" nor the direction to pay into their own "proper hands," taken singly or in conjunction, was sufficient to create a separate estate; the rents might be paid into the proper hands of the wife, and yet she might be incompetent to give a receipt to the trustees. The only authority, he observed, for ascribing such an effect to the direction to pay "into their own proper hands," was the case of *Hartley v. Hurle*, (mentioned *supra*, p. 478,) "which was a case under peculiar circumstances, and in which that was not the point principally considered."

In *Massey v. Parker*,^(k) the testatrix gave the interest of her residuary estate to her two grand daughters, then unmarried, "to be for and under the sole control of my said two grand daughters, the principal to be equally divided for the use of the surviving issue; but if either," (*so in original*), "and that Mary Wadsworth, their mother, shall have no control whatever over this their property, and at the demise of the said Eliza and Rebecca Wadsworth, the principal to be equally divided for the use of their surviving issue." In a question between one of the grand daughters and the assignee under the insolvency of her husband, Sir C. Pepys, M. R., held, there was nothing to shew that the testatrix had present to her mind the right which future husbands would obtain, and that the words were used with reference to the possible control of the mother, and therefore, that the husband had an interest in the wife's legacy.

In *Rycroft v. Christy*,^(l) a testator directed his trustees to pay the interest of his estate to A. R., then an unmarried woman, or her assigns, during her life, "for her and their own absolute use and benefit." In a question as to *the validity of a gift by A. R. out of the interest after she had [482] become married, but made without the consent of her husband, Lord Langdale said, it was very probable the testator intended to give the property for A. R.'s separate use, but he could not say such was the effect of the words.

In *Blacklow v. Laws*,^(m) the testator gave a legacy to Alice, "for her own sole use and benefit," and an annuity to his widow, to be paid "into

(i) 2 Russ. & My. 183.

(k) 2 My. & K. 174.

(l) 3 Beav. 238.

(m) 2 Hare, 40; see, also, *Beales v. Spencer*, 2 Y. & C. C. C. 451.

her own proper hands for her own proper use and benefit," with a clause against anticipation; and then he directed an annuity to be paid during the life of his widow "into the proper hands of my youngest daughter, Anne, (now the wife of James Laws,) for her own proper use and benefit:" Sir J. Wigram, on the authority of *Tyler v. Lake*, held, that the annuity was not the separate estate of Anne.

The circumstance of the woman having been married at the time of the gift, and its having been vested in a trustee to pay to her, will not be sufficient to exclude the husband without negative words expressly excluding him.⁽ⁿ⁾ Neither the fact that the trust is of a will generally, under which the gift is derived;^(o) nor that the trust is confined to the particular gift;^(p) nor will it make any difference that the husband is himself one of several trustees,^(q) or the sole trustee.^(r) In *Wills v. Sayers*,^(s) and *Kensington v. Dollond*,^(t) a bequest to a married woman of a residue "for her own use and benefit," following after a legacy for her "sole and separate use and benefit," was held not to be given as separate estate; and in *Roberts v. Spicer*,^(u) this effect was denied to the same words, standing by themselves, without any contrast.

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*CHAPTER II.

SEPARATE ESTATE CREATED BY POWER RESERVED BY THE WIFE BEFORE MARRIAGE.

ONE of the disabilities of coverture is, that a married woman cannot make a will of her personalty without the consent of her husband; and as to her real estate, the 14th section of the 34 & 35 Hen. 8, c. 5, enacts, that wills of lands by married women shall not be effectual in law. A woman may, however, before marriage, reserve power to herself to convey her estate, real or personal, during marriage. This she may effectually do in several ways; for, while yet sole and separate, and all her heirs in herself, she has a right to bind them discretely and arbitrarily. Thus, in the case of lands, the legal estate of which is in herself, she may convey them in trust for such uses as she shall appoint notwithstanding coverture; and a disposition of the uses made in compliance with the terms required by the reserved power, will be effectual, per se, against her heir-at-law.^(a) Nay, if, before marriage, she agree with her intended husband that her estate should be conveyed to trustees for her separate use, her mortgage of the lands, granted during coverture, will be sustained in favour of the mortgagee, although a

(n) *Dakins v. Beresford*, 1 Ch. Ca. 194; *Lumb v. Milnes*, 5 Ves. 517.

(o) *Lumb v. Milnes*, ubi supra.

(p) *Dakins v. Beresford*, ubi supra.

(q) *Ex parte Beilby*, 1 G. & J. 167.

(r) *Kensington v. Dollond*, 2 My. & K. 184.

(s) 4 Madd. 499.

(t) 2 My. & K. 184.

(u) 5 Madd. 491.

(a) *Churchill v. Dibbin*, noticed in *Wright v. Cadogan*, 2 Eden, 252.

conveyance in pursuance of the agreement may never have been made.(b) If the disposition by the married woman be by defective execution of a reserved power, a court of equity will, in favour of the husband or issue of the marriage, supply the defect, and so make the disposition effectual against the *wife's heir-at-law, although the power may have been reserved [484] to be executed by *deed* or will, so as to suggest a doubt whether the issue of the marriage were exclusively intended to be the objects of the power.(c) But the Court will not aid such a defective execution of the power in favour of volunteers, such as a *natural* son of the wife.(d)

If the fee of the lands be not in the woman at the time she reserves power to convey them, this will not make any difference in regard to her power to make such reservation and to carry it into effect. Thus, if, prior to marriage, she is entitled to an equitable reversion in fee, the legal estate being in trustees of the will, under which she derives right, a reservation by her, prior to marriage, of a right to convey the land during coverture, will receive effect;(e) and it will do so, notwithstanding she may not have remodelled the estate by an instrument creating the new trusts and uses, for these will attach upon the seisin in the trustees of the will of the testator, through whom she devises her right.(f)

Further, a power to convey after marriage may be reserved without resorting to a conveyance to trustees prior to marriage; for if a woman, prior to marriage, make an executory agreement to convey during marriage, such an agreement will be treated as binding upon her heir-at-law, as fully as the contract of any other person *sui juris*. In *Cannel v. Buckle*,(g) a bond had been given by a woman to her intended husband, that, in case the marriage should take place, she would convey her lands to him and his heirs, and the bond received effect in equity as evidence of an agreement, prior to marriage, for a valuable consideration, although it was admitted that the bond became by the marriage void at law.

*The principle upon which these cases apparently rest is, that the woman has, while *sui juris*, kept herself as a *feme sole* in regard to [485] the lands over which the reserved power of disposition extends.(h) How far permitting her to do so and thereby expose herself to those influences, which the rule in regard to the disabilities arising from coverture was intended to protect her from, is reconcileable with the policy upon which those disabilities were introduced into the law, may be questionable;(i) but the doctrine that she may do this is too well established, upon the cases which have been referred to, to make it now disputable, though it was so at one time.

(b) *Power v. Bailey*, 1 Ba. & Bla. 49.

(c) *Rippon v. Dawding*, Amb. 565.

(d) *Bramhall v. Hall*, Amb. 467, n.

(e) *Wright v. Cadogan*, 2 Eden, 239.

(f) *Wright v. Cadogan*, ubi supra; S. C., *Wright v. Englefield*, Amb. 468.

(g) 2 P. Wms. 423.

(h) *Wright v. Cadogan*, 2 Eden, 258.

(i) *Newman v. Whistler*, 4 Ves. 135.

CHAPTER III.

TRADING BY WIFE FOR HER SEPARATE USE.

INDEPENDENTLY of the power of a married woman to acquire property, either by the gift of her husband or of others, to be enjoyed separately from her husband, when it is given for that purpose, she may likewise acquire property to be enjoyed in this manner when her husband allows her to trade on her own separate account. Though, by the common law, the property of a woman is, by her marriage, vested in her husband, yet, as has been seen, this legal effect of marriage may be avoided by vesting her property in trustees, prior to the marriage, for such purposes as she may choose to appropriate it to.

If, then, with the consent of the husband prior to marriage *the [*486] property of the wife be vested in trustees for the purpose of enabling her to trade with it on her separate account, this is such a trust as will be recognised both at law and in equity; and the profits arising from the trade will belong to the wife as her separate estate; (a) for, the legal estate being in the trustees, the courts of law will treat the acts of the wife, in the course of the trading, as done by her in the character of agent for the trustees. (b)

An agreement of this nature, made for the valuable consideration of marriage, will be good, not only against the husband himself, but against the husband's creditors; (c) and neither the property assigned to the trustees for the purposes of the trading, nor the profits earned in the course of the trading, will, upon the bankruptcy of the husband, pass to his assignees, under the 21 Jac. 1, c. 19, as having been in his "possession, order, and disposition," although the trade may have been carried on in a house possessed by the husband and wife in common; for the consequence of the wife being considered as the agent of her trustees is, that her possession is their possession. (d) And it will not form any obstacle to the assertion of the wife's right through her trustees, that an inventory or schedule of the property assigned was not made out, if the property can be sufficiently identified, and any surmise of fraud be negatived. (e) Yet, singularly enough, the personal clothes of a married woman, purchased by herself with money settled to her separate use, was found, in *Carne v. Brice*, (f) to be liable to execution for the husband's debts, because there was no proof that the wife purchased as the agent of her trustees.

If, with the consent of the husband given *after* marriage, *pro- [*487] perty is vested in trustees for the purpose of enabling the wife to trade with it on her separate account, this also is a trust which will receive effect, both at law and in equity, against the husband and those claiming as volunteers under him; and, subject to the observations which have been made elsewhere, (g) in regard to the validity of settlements made *after*

(a) *Haselinton v. Gill*, 3 T. R. 620, n.; *Jarman v. Woollaton*, Id. 620.

(b) Id. 622.

(d) *Jarman v. Woollaton*, 3 T. R. 622.

(f) 7 M. & W. 182.

(c) *Haselinton v. Gill*, ubi supra.

(e) Ibid.

(g) Ante, pp. 435 et seq.

marriage, it will also be effectual against the creditors of the husband, if made either for valuable consideration, or while the husband was in solvent circumstances.

If the husband, either before or after marriage, consent that the wife shall trade on her own separate account, but without the interposition of trustees, in whom to vest either the property she is to trade with, or the earnings in the trade, the power of the wife to acquire property in this way will depend upon the jurisdiction in which the question may be raised. At law, excluding of course the custom of London, ^(h) there will be nothing to prevent application of the rule, that a married woman cannot hold or acquire property during the coverture, and both her stock in trade and her earnings will consequently be the property of her husband. This was strongly illustrated in the case of *Barlow v. Bishop*. ⁽ⁱ⁾ There, a married woman, being hard pressed by a creditor in the course of her trading with consent of her husband, received from a third party a promissory note payable to her order, which she indorsed with her own name to the creditor. In an action by the indorsee against the maker, it was found that he could not recover, as the delivery of the note to the wife vested the interest in the husband. In equity, on the contrary, if the consent of the husband to the separate trading, and the enjoyment of the earnings by the wife to her own use, be unequivocally established, should no trustees have been *interposed, the intention will not be allowed to be defeated on this account; for the ^[*488] husband will be considered the trustee of the wife, as has already been shewn. ^(k) Indeed, equity seems to have gone so far as to presume a consent to separate trading in the circumstance of the husband having deserted the wife and left her destitute. At all events, it treated property given to the brother of the wife, to be lent to her for the purposes of trading, as property given in trust for her separate use, and decreed both the property and the earnings to be re-delivered to her as her own property, by the husband, who had seized them as his. ^(l) But the evidence of the husband's intention to allow the earnings to go to the wife as her separate property must be direct and unequivocal, as was stated elsewhere. ^(m) Of this *Lamphir v. Creed* ⁽ⁿ⁾ is an instance. There, a woman, carrying on the business of a greengrocer apart from her husband, (whether with or without his consent did not appear,) agreed with another man, that, upon his assisting her to purchase a lottery-ticket with money to be advanced by her, he should have a half of whatever prize the ticket might turn out. A bill by the third party to establish his right to the half of the ticket was dismissed, by Sir W. Grant, M. R., who observed, that the share, the moment it was purchased, became the husband's, unless he chose to assent to the partnership.

With regard to the liabilities arising out of the wife's separate trading, Roper ^(o) is of opinion, that, if the wife be entitled to the profits of the trade, as her separate estate, and the trading have been by consent of the husband, without the intervention of trustees, the husband will not be liable for her engagements made in the course of it; and, therefore, although the

(h) For which vide ante, p. 18.

(k) 4 Vide ante, p. 474.

(m) Vide ante, p. 477.

(o) Vol. 2, p. 174.

(i) 1 East, 432.

(l) Cecil v. Juxon, 1 Atk. 278.

(n) 8 Ves. 599.

[*489] husband might be primarily liable *at law upon the wife's acts, a court of equity, while it would leave the funds in the trade subject to the debts of the wife, would prevent legal execution against the husband; and, on the other hand, if the trading have been with the intervention of trustees, the husband would not be liable, because the acts of the wife are held to have been done, not as his agent, but as agent of the trustees; and although the trustees might, therefore, like the husband in the other case, be primarily liable, yet, as the wife is the only person beneficially interested, a court of equity would protect the trustees from legal execution. But Jacob, in a note to this, differs from Roper, and is of opinion, that if the husband or the trustees have, by permitting or sanctioning the separate trade, rendered themselves responsible at law, there is no principle upon which a court of equity could relieve them from this liability as against the creditors, any more than it could relieve an executor from his personal liability for loss incurred by continuing his testator's trade. And certainly, although the case of an executor trading by himself is different from that of a husband or a trustee doing nothing by himself, or allowing anything to be done upon his own personal credit, so far as the trading is concerned, yet if it be admitted, as it is by Roper, that the husband or trustee is liable at law, it is not obvious how equity could give relief.

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*CHAPTER IV.

THE AMOUNT OF INTEREST WHICH THE WIFE TAKES UNDER PARTICULAR TERMS OF SETTLEMENTS OR GIFTS OF SEPARATE ESTATE.

WHEN property is given to a married woman, or is reserved by herself to her separate use, the extent of interest she takes, and the necessity for her transmitting the property to others by execution of a power of appointment, when it is given with such a power, will depend upon the terms used for the purpose.

If estate be given to a married woman *for her life*, with a power of disposition by *will*, but without any gift over in default of execution of the power, she will not take more than an estate for life, with a power of appointment as to the inheritance; for, where the limitation is expressly of an estate for life, the Court will not, by implication from the extent of the power of appointment, extend the interest under the express gift to a larger estate. If, therefore, the wife die without having executed the power, her interest will cease with her life; (a) and, in order to transmit the property to others, not purchasers, it will be necessary, where the power is not in the nature of a trust, that she should have executed the power according to its

(a) Tomlinson v. Dighton, 1 P. Wms. 149; Sockett v. Wray, 4 Brp. C. C. 483; Nan-
nock v. Horton, 7 Ves. 397; Reid v. Shergold, 10 Ves. 370.

terms.(b) If, after the express gift for life, words should be inserted giving an absolute right of disposal, as that the wife shall "not be accountable for the value or particulars, these will be construed, with reference to the interest for life previously given, as intending that she shall have as full, free, and absolute a disposition as a tenant for life can have, and not as enlarging the gift for life.(c)

If, however, from the terms of the instrument, it is apparently the intention that the wife should have the absolute property, and that qualifying terms in the gift were introduced merely for the purpose of protecting her during the coverture, and preventing the property from going, at her death, to her husband, as her administrator, the instrument will receive this construction.(d) Accordingly, in *Elton v. Sheppard*,(e) where a sum of stock was given in trust to pay the *interest* to a married woman for her separate use, and power was given to her to dispose of the capital by will, or writing under her hand, Sir T. Sewell, M. R., held that the wife had an absolute interest, and that the subsequent words, giving a power of appointment, were merely an anxious expression of intention that she should have an uncontrollable power of disposition. In *Hales v. Margerum*,(f) similar effect was given to a gift of stock, upon trust, for the separate use of a married woman, "all interest and dividends" to arise after the death of the donor to be paid to her for her separate use; "and, whensoever she shall happen to die," the stock "to be absolutely in her own power to dispose of," by deed or will, notwithstanding her coverture. Lord Alvanley held, that the stock was, to all intents and purposes, the absolute property of the married woman, as fully as any married woman could enjoy an absolute gift, merely qualified in respect of her situation, lest upon her death it should go to her husband. *And, in *Heatley v. Thomas*(g)—where a legacy, payable to a married woman, was, by her marriage settlement, allowed to remain in the hands of the executor at interest, and it was agreed that the interest should be paid to her for her separate use, and that she might, at any time during the coverture, by will, dispose of the capital as she should think fit; in default of which disposition, in the life of her husband, the capital should go to her next of kin, according to the Statute of Distributions; and, in case she should survive her husband, the capital should be paid to her—Sir W. Grant, M. R., determined that the legacy was well assigned by the married woman, as a security for money lent to her husband; thereby affirming that she had an absolute right of property and power of disposition in her lifetime.

But where there is a gift to a married woman for life, with a power of appointment, and a gift over in default of execution of the power, the extent of the interest she takes will be influenced by the nature of the gift over. If the gift over is to the executors and administrators of the wife, in their representative capacity, and not beneficially, which, as to personal property, is the same in effect as a limitation to right heirs as to real estate,

(b) *Croft v. Slee*, 4 Ves. 60; *O'Keate v. Calthorpe*, referred to in *Sperling v. Rochfort*, 8 Ves. 177; *Reid v. Shergold*, ubi supra; *Bradley v. Westcott*, 13 Ves. 445.

(c) *Bradley v. Westcott*, 13 Ves. 445.

(d) *Reid v. Shergold*, 10 Ves. 378.

(e) 1 Bro. C. C. 533.

(f) 3 Ves. 299.

(g) 15 Ves. 596; see also, for reasons of judgment, *Lee v. Muggeridge*, 1 V. & B. 122; see also *Reith v. Seymour*, 4 Russ. 263; and *Mayer v. Townsend*, 3 Bea. 443.

this will enlarge the gift from one for life to an absolute gift, ^(h) to be enjoyed with a general right of alienation where it is given to her separate use, but so that she cannot dispose of the fund otherwise than in the manner prescribed by the power. ⁽ⁱ⁾ Where the gift over is to the executors or administrators of the wife, not in their representative capacity, but beneficially, this will not enlarge the gift for life into an *absolute estate, [*498] any more than a gift of lands to the heir of A. B. would be a gift to A. B. himself. In such case, all that the woman will take will be an estate for life, with a power of appointment; and if she has not executed such power, or has done it defectively, the property will not pass to her executors and administrators in their representative character, but in their own right. ^(k) So, also, if the gift over be to the next of kin of the wife, according to the statute, or to strangers, it will receive a construction as one for life only, ^(l) upon the principles which have been already indicated; and, in order to transmit the property by the wife, it will be necessary that the power be executed according to its terms.

If the gift be to a married woman of the income of property, to her separate use, with a power to appoint the capital, and no gift over, as the gift is general, and not for life only, it will be construed to give her an absolute right of property, which will pass to her representatives, if the power has not been exercised by her according to its terms; ^(m) for a general gift of income is considered as a gift of the capital out of which the income is to arise. But the capital not being given to her separate use, she cannot, *in her lifetime*, dispose of it otherwise than as allowed by the power of appointment. ⁽ⁿ⁾

It should be observed here that the wife may, in any way, by her will or otherwise, dispose, at her pleasure, of the savings from property settled to her separate use; but, in so far as she may not have done so, the savings [*494] will, upon her death, belong to the husband surviving, *jure mariti, and not as her administrators. ^(o) Yet it must be admitted, that, in a case ^(p) previous to that which has been cited at foot, in which it had been agreed in marriage articles that money in the funds, the property of the wife, should be for her sole and separate use, Sir J. Leach, V. C., ruled, that the money, which had never been settled pursuant to the articles, belonged to the husband, surviving, in the character of administrator of the wife.

(h) *Anderson v. Dawson*, 15 Ves. 537.

(i) *Socket v. Wray*, 4 Bro. C. C. 486, n. (7); *Bradley v. Westcott*, 13 Ves. 453; *Doe v. Thorley*, 10 East, 438; *Holloway v. Clarkson*, 2 Hare, 521; *Nixon v. Nixon*, 2 J. & L. 416.

(k) *Sanders v. Franks*, 2 Madd. 154. As to the terms which will give a beneficial interest to executors and administrators, see *Attorney-General v. Malkin*, 2 Ph. 64; *Meryon v. Collett*, 8 Beav. 386, and the cases there cited.

(l) *Hansen v. Miller*, 8 Jur. 209.

(m) *Elton v. Sheppard*, 1 Bro. C. C. 533.

(n) *Richards v. Chambers*, 10 Ves. 580; *Lee v. Muggeridge*, 1 V. & B. 122.

(o) *Moloney v. Kennedy*, 10 Sim. 254.

(p) *Proudley v. Fielder*, 2 My. & K. 57.

CHAPTER V.

DISPOSITION BY THE WIFE OF PROPERTY SETTLED OR GIVEN TO HER SEPARATE USE WHERE THE SETTLEMENT OR INSTRUMENT OF GIFT DOES NOT CONTAIN ANY RESTRAINT OF THE POWER OF ALIENATION.

WHERE, then, a woman has, prior to marriage, reserved power to dispose of her property after marriage, she is, in regard to it, in the same predicament as where property is given to her by third parties for her sole and separate use; and in such a case she is competent to act, in regard to the property, in all respects as if she were a feme sole; (a) and, as one of the incidents of property, she may dispose of it in any way she may think proper. (b) Thus, in *Dowell v. Dew*, (c) an agreement made by a married woman to renew, "when it should expire, a subsisting lease of lands, in which she had an estate for life to her separate use, with a power [*495] to lease, was held to be a binding agreement upon those entitled to the lands after the death of the wife. If, however, by the instrument creating the separate estate, she is limited in regard to the mode of disposition, her disposition, to be effectual, must conform to the mode prescribed. (d) Accordingly, where property is given to the separate use of a married woman, without mention of a power of disposition, she may dispose of it in any way she thinks fit. Thus, in *Wagstaff v. Smith*, (e) where the dividends of a sum of stock were given to a married woman for her separate use, it was determined, not only that she was entitled to take them up from time to time as they became due, but that she might assign them by anticipation, as a security.

This power of disposition by the feme coverte, of property given to her separate use, extends to her reversionary interests as well as her interests in possession. (f)

In *Whistler v. Newman*, (g) Lord Loughborough, while he regretted that the cases had established the right of a feme coverte to deal at her discretion with her separate estate, because it put her in a worse situation than if she had been left to her legal right, he at the same time acknowledged their authority, as in questions with creditors not bound by any tie of duty to the woman; but he refused to receive them as authority for taking from her her life-interest in a fund, which the trustees of her settlement had prevailed upon her to consent to being paid over to her husband, whereby the fund was lost through the insolvency of the husband. But, inasmuch as the wife was, in all respects, a feme sole in regard to this property, and therefore, in respect of it, not entitled to greater protection than any "other [*496] cestui que trust, the authority of this case is more than doubtful. (h)

Where the power reserved to the married woman of disposing of her

(a) *Peacock v. Monk*, 2 Ves. sen. 190; *Hulme v. Tennant*, 1 Bro. C. C. 18.

(b) *Fetteplace v. Georges*, 1 Ves. jun. 48. (c) 12 L. J., N. S., 158.

(d) *Rich v. Cockell*, 9 Ves. 369; *Sockett v. Wray*, 4 Bro. C. C. 484. (e) 9 Ves. 520.

(f) *Sturgis v. Corp*, 13 Ves. 190; *Headen v. Rosher*, M'L. & Y. 69.

(g) 4 Ves. 129.

(h) 2 Roper, 185.

separate property is, by the terms of the instrument creating the estate, to be executed by deed or will, the instrument executing the power must be technically what is known in law as a deed or a will. Thus, if a deed, it must be under seal, and have been delivered;(i) or if a will as to personalty, before a court of law or equity will look at it, to see whether the requisites of the power have been complied with, it must have been admitted to probate by the Ecclesiastical Courts;(k) and if as to realty, it must, if made prior to the Wills Act,(l) have been executed in the manner which was then required for the passing of real estates;(m) and if executed subsequently, it must have been made in conformity with that statute.

Whether the particular forms and ceremonies, which, by the terms of the reserved powers, may be required to be observed in order to the proper authentication of the execution of the power, have been complied with, is a subject not proper for this treatise, and will be found very fully treated of by Sir E. Sugden.(n)

Where rents and profits are given to a married woman, for her separate use, as she shall appoint by writing under her hand, and in default of such appointment to be paid into her own hands, any act which may reasonably be construed to have reference to her right over this income will be effectual to pass it. Thus, a sale of the right to draw the rents, in consideration of their value, paid by a gross sum in anticipation, will be good,(o) notwithstanding the *words "from time to time" should occur in the [*497] gift.(p) In *Stead v. Nelson*,(q) lands were settled to the use of a married woman for life for her separate use, or to the use of such persons as she should "by writing under hand and seal" appoint; and, in default of such appointment, then in trust to pay the rents into her own hands for her separate use, and upon her own receipt alone. She joined with her husband in signing a memorandum not under seal, by which she agreed to appoint and convey the settled lands in mortgage for money borrowed by the husband. After the husband's death, without a mortgage having been executed, the wife resisted a suit to compel such execution, on the ground that she had only a legal life-estate, which could not be parted with unless by a due execution of the power, which had not been done, as the memorandum was not under seal; but Lord Langdale, M. R., decreed the mortgage to be executed as asked by the bill. In *Major v. Lansley*,(r) an equitable title to an annuity was vested in a married woman, the legal title being in her husband: and she joined with her husband in executing a mortgage of the annuity. After the husband's death, the legal title vested in the wife, and she then disputed the validity of the mortgage, on the ground that her equitable interest had ceased with the vesting of the legal title; and, as the mortgage had no operation upon the legal title, she was entitled to the annuity, freed from the charge; but Sir J. Leach, M. R., held, that the subsequent accession of the legal interest could not defeat the equitable assignment of the beneficial interest before made for a full consideration,

(i) *Doe v. Staples*, 2 D. & E. 695.

(k) *Ross v. Ewer*, 3 Atk. 160; *Stone v. Forsyth*, Doug. 709.

(l) 1 Vict. c. 26.

(n) Sug. on Powers.

(m) 2 Roper, 186.

(o) *Brown v. Like*, 14 Ves. 302.

(p) *Witts v. Dawkins*, 12 Ves. 501; *Brown v. Like*, 14 Ves. 302.

(q) 2 Beav. 245.

(r) 2 Russ. & My. 355.

and decreed accordingly. In *Bullpin v. Clarke*,^(s) a bill accepted by a married woman, as a security for money which had been lent to her upon the credit of her *separate estate in the rents of lands, was decreed [*498] to be paid out of such rents.

Where property is given to a married woman, to be enjoyed as a separate estate, without any restraint as to anticipation, she is a feme sole in regard to it, not only in questions between her and the world at large, but also as between her and her husband, so that she may give it over to him, although apparently defeating thereby the very object of the gift;^(t) but such a case the Court will look upon with great jealousy, to see whether any improper influence by ill or even too good usage has been used by the husband to procure the gift.^(u) Accordingly, although the judicial consent of the wife is not necessary in such a case to the passing of her interest,^(v) yet if the matter should come before the Courts, as where trustees have rendered a suit necessary by refusing to pay over the fund, the Courts will require the actual presence of the wife in court, in order to be satisfied that it is her deliberate act.^(w) But, being satisfied that the gift is her deliberate wilful act, the Court will enforce its performance in favour of the husband, or of third parties claiming through him.^(x)

If a power of appointment has been defectively executed by a married woman in favour of her husband, the defect will not be supplied in equity^(y) unless the husband claim the benefit of the appointment, as purchaser for valuable consideration;^(z) although a defective execution *by the husband*, in favour of the wife, will be aided in equity, upon the general ground of the duty of a man to provide for his wife.^(a)

It is not necessary, in order to pass the separate estate of *the wife to the husband, that there should be an express substantive [*499] gift from her to him. It will be sufficient that the circumstances give rise to a necessary implication that such a gift was intended. Thus, where a wife allowed her husband to call up money invested upon mortgage forming part of her separate estate, and joined with him in executing a deed, which recited that it was agreed that the money should be to their own use, and thereafter allowed him to re-invest the money and draw the interest upon it, and, after his death, acted in regard to the money as if she were the executrix of the husband, Lord Hardwicke held these facts as sufficient to show an intention by the wife that the money should form part of her husband's estate.^(b) So, if the wife permit the husband to receive and spend the income of her separate estate, it will be implied that she intended a gift of it, and he will not be accountable to her or her representatives for what he may have so received.^(c)

(s) 17 Ves. 365. See also *Nail v. Punter*, 5 Sim. 562.

(t) *Grigby v. Cox*, 1 Ves. sen. 518.

(u) *Ibid.*; *Parkes v. White*, 11 Ves. 222.

(v) *Sturgis v. Corp*, 13 Ves. 192.

(w) *Milnes v. Busk*, 2 Ves. jun. 500.

(x) *Essex v. Atkins*, 14 Ves. 546; *Pawlet v. Delaval*, 2 Ves. sen. 663.

(y) *Moodie v. Reid*, 1 Madd. 521.

(z) *Sergeson v. Sealey*, 2 Atk. 413.

(a) *Tollett v. Tollett*, 2 P. Wms. 490.

(b) *Pawlet v. Delaval*, 2 Ves. sen. 667.

(c) *Smith v. Camelford*, 2 Ves. jun. 715; *Milnes v. Busk*, *Id.* 494; *Dalbiac v. Dalbiac*, 16 Ves. 124; *Squire v. Dean*, 4 Bro. C. C. 326; *Bartlett v. Gillard*, 3 Russ. 149; *Beresford v. Armagh*, 13 Sim. 643; but see contra, *Howard v. Digby*, 8 Bligh. N. C. 258.

In *Carter v. Anderson*,^(d) this maxim of implied gift by the wife to the husband was given effect to in favour of a third party. There the husband had acted for some years, with the knowledge of the wife, under a power of attorney from the proprietor of an estate in the West Indies, upon which an annuity was charged for the separate use of the wife. She repeatedly asked her husband, in his character of attorney, for payment of her annuity, but received evasive answers instead of it. She did not, however, follow up the matter by personal application to the proprietor, and, ultimately, her husband became bankrupt while in debt to his principal. In these circumstances, Sir L. Shadwell, V. C., held, that, as the wife lived with the husband and *enjoyed the benefit of the expenditure of the rents which

[*500] he had applied to his own use, the report of the Master, that nothing was due to the wife in respect of her annuity, ought not to be disturbed. A contrary construction might be a hardship upon the husband, who probably depended on the wife's permitting him to receive the income, and lived in a more plentiful manner, of which she shared the benefit, than he would otherwise have done.^(e) And even where the wife was, from insanity, incapable of making a gift, and the husband had received the income of her separate estate under a power of attorney granted before her insanity, in directing an account against the husband, consideration was ordered to be had of the extraordinary expense attending the maintenance of the wife as an insane person.^(f)

As was said by Sir Thomas Sewell, M. R., in *Burdon v. Burdon*,^(g) there is no difference between pin-money which may come out of the husband's estate and what may be settled for the separate use of the wife out of her own estate, in regard to the failure in payment by the husband of the one or his receipt of the other. If, therefore, the circumstances attending the receipt by the husband of the income of the wife's separate estate should negative any implication of a gift from her, the husband will be decreed to account to her for his receipts.^(h)

But even where the circumstances are sufficient to raise the implication of a gift from the wife to the husband, the cases are conflicting as to whether the wife should not be allowed to have one year's account of the income of her separate estate as against the husband. In *Townsend v. Windham*,⁽ⁱ⁾ where the wife had allowed the husband to receive and spend her separate

[*501] estate for several years, and *one question in the case was in regard to paraphernalia, Lord Hardwicke said, "As in the case of pin-money, a wife, suffering her husband to receive the rents and profits of her separate estate, cannot come for it afterwards, and is allowed only to come in as a creditor for one year's arrear of pin-money, the same holds as to this." In *Peacock v. Monk*,^(k) where the account sought by the representatives of the husband against the wife, was of money invested by her, during the coverture, in the purchase of land, the same judge said, the Court had "laid down rules to prevent such accounts between husband and wife, which it was impossible to determine according to the rights after the death of the

(d) 3 Sim. 370.

(e) *Powell v. Hankey*, 2 P. Wms. 83.

(f) *Attorney-General v. Parnter*, 4 Bro. C. C. 408.

(g) In note (i) to *Ex parte Elder*, 2 Madd. 286.

(h) *Parker v. Brooke* 9 Ves. 583.

(i) 2 Ves. sen. 7.

(k) 2 Ves. sen. 190.

parties, as in the case of pin-money, which it never carries back beyond the year." And in *Parkes v. White*,^(l) Lord Eldon said, obiter, the wife might permit the husband to receive the property from time to time, and in that case the Court will only give the account for one year; and, in an earlier case, (*Burdon v. Burdon*),^(m) Sir Thomas Sewell, M. R., is stated to have said, "Where the husband for many years receives the separate estate of the wife, and they appear to have lived well together, and the husband dies, his personal estate shall not be wholly discharged from what he received, but she shall have an allowance thereout for one year's amount of the separate estate." But in *Powell v. Hankey*,⁽ⁿ⁾ where the question arose for decision, Lord Macclesfield said, "The husband's maintaining the wife barred her claim in respect of separate estate; and, if it were not demanded by her, she would be concluded, even where she had no other person to demand it of but her husband, which probably she might be afraid to do." In *Squire v. Dean*,^(o) an account of the husband's receipts was confined, by Lord Loughborough, to the period *prior to their intermarriage. In *Smith v. Camelford*,^(p) the same judge said generally, "If the wife [*502] permitted the husband to spend the income of her personal estate, he was not accountable." And in *Dalbiac v. Dalbiac*,^(q) where an account was sought by the wife against the husband's assignee and creditors, Lord Eldon said, "It could not go back further than the death of the husband; as they lived together, she would be entitled to no account against his representatives, and, therefore, not against his creditor and assignee." Such is the inconsistency between the cases; but this is to be observed, that, while in *Townsend v. Windham*, *Peacock v. Monk*, *Parkes v. White*, and *Burdon v. Burdon*, special mention is made of an account for one year against the husband, in *Powell v. Hankey*, *Squire v. Dean*, *Smith v. Camelford*, and *Dalbiac v. Dalbiac*, the observations are directed to the non-liability of the husband to account generally, and nothing is said as to his not being liable for only a year's receipts. That does not receive any notice from the Court, and may not have been raised by the parties. The result, therefore, seems to be, that an account of the husband's receipts of the separate estate for one year will be allowed.

Where property is settled to the separate use of a married woman, without any restraint upon her as to anticipation, it is not necessary, in order to pass the estate from her to her husband, that she should give any judicial consent, whether her interest be in reversion or possession;^(r) for, in regard to this property, she is a feme sole, with all the powers of absolute disposition incident to a right of property. But if the wife be entitled to the income of the estate, and have only a power to appoint as to the principal, it will be necessary, as before observed, in order to *pass the estate, [*503] that she execute the power according to its terms. This will not, however, be necessary where the estate, in default of her appointment, is limited to the husband, and she desires, in her lifetime, to pass the capital to him; for she may accomplish this by suit, along with her husband, and

(l) 11 Ves. 225.

(n) 2 P. Wms. 84.

(p) 2 Ves. jun. 716.

(r) *Sturgis v. Corp*, 13 Ves. 192.

(m) In a note, 2 Madd. 286.

(o) 4 Bro. C. C. 326.

(q) 16 Ves. 126.

a decree for payment to him will be made without execution of the power being required.^(s)

CHAPTER VI.

OF THE RESTRAINT AGAINST ALIENATION OF PROPERTY SETTLED TO THE SEPARATE USE OF A MARRIED WOMAN.

ACCORDING to the common law, the personal estate of a married woman becomes the property of her husband immediately upon the marriage; and, during the coverture, she cannot dispose either of her personal or her real estate without his assent. It is also a rule of the common law that a power of alienation is an inseparable incident of the right of property. Equity has encroached upon the common law in both of these respects. As has been already seen, equity recognises in a married woman the power to hold property which she has before marriage reserved to herself, or which either before or during marriage has been given to her by others, to be enjoyed separate from, and independent of, the power of her husband; and it treats her, in regard to the management and the disposal of this property, as a *feme sole*.

[*504] While equity has thus departed *from the common law as to the power of the married woman to acquire and deal with separate estate, so it has encroached upon the maxim of the law in regard to the power of alienation of this property, which, as to all other property, as has been noticed, is considered an inseparable incident; for equity acknowledges, what the law will not permit, the power of the wife, where she reserves the property before marriage, and of the donor, where she obtains it by gift from other parties, to impose upon her a restraint of alienation.

One original intention of giving a married woman property for her separate use, with a power to appoint it, independent of her husband, evidently was to enable her to enjoy the property as against her husband, and to protect the wife against him, whom both religion and morality, and the common law of the country, had taught her to consider as her natural protector, with whom she should have all things in common. Whether this object of equity was originally founded in sound principle need not be inquired into here, but the machinery for its accomplishment had not been well considered or ingeniously devised; for the obvious consequence of creating this new rule, as to the acquisition of separate property, without at the same time making a new rule in regard to its inalienability, was to leave married women pretty much as the rule found them at the outset; for the common law knows of no such anomaly as a right of property without a universal power of disposal; the necessary consequence, therefore, of a separate estate in the wife was a power in her to give the property to the husband, and thereby defeat the very object of the creation of the estate.

(s) *Chesalyn v. Smith*, 8 Ves. 184; *Clarke v. Pistor*, cited in *Ellis v. Atkinson*, 3 Bro. C. C. 568.

In *Ellis v. Atkinson*,^(a) the terms creating the separate estate were to pay the interest to the married woman **"into her proper hands,"* or to such person as she should by writing, *"from time to time,"* [*505] appoint. These words, it was argued, prevented the wife from disposing of her estate by anticipation, or otherwise than as it should arise from time to time; but Lord Thurlow, though sensible how far equity was defeated of its object, and though he shewed a strong desire to infer, from the terms used in the creation of the separate estate, a restraint upon the wife's power of alienation, felt himself constrained by the previous cases to decree the property to the husband, as asked by the bill of the husband and wife; and again, in *Pybus v. Smith*,^(b) he made the same decree, observing, that, if it was the intention to give a provision to a child in such a way that she could not alienate it, he saw no objection to it being done; "but such intention must be expressed in clear terms." In *Parkes v. White*,^(c) Lord Eldon said, referring to the decisions of Lord Thurlow in *Ellis v. Atkinson* and *Pybus v. Smith*, that the terms *"to be paid into the proper hands"* of the wife, receipts to be given *"from time to time,"* &c., were only an unfolding of all that is implied in a gift to the separate use. In *Witts v. Dawkins*,^(d) the same words were considered by Sir W. Grant as not affording any obstruction to the wife's alienation; and, in *Acton v. White*,^(e) Sir J. Leach was of the same opinion as to the effect of a direction to pay into the proper hands of the wife alone. At length Lord Thurlow, giving personal and private recognition of the force of the doctrine he had himself laid down in *Pybus v. Smith*, of the necessity of clear expression, in order to restrain the power of alienation, caused to be inserted, as a proviso upon the power of appointment given to the wife, in the settlement of a Miss Watson, under which he was a trustee, these words, *"and not by anticipation."*^(f) *In *Jackson v. Hobhouse*,^(g) Lord Eldon said, that Lord Alvanley had, in *Socket v. Wray*,^(h) thought that this was a valid clause: [*506] this does not appear from the report of that case; but, on the other hand, Lord Alvanley, at all events, repeated in it the opinion of Lord Thurlow in *Pybus v. Smith*, without expressing dissent from it; and, in *Jackson v. Hobhouse*, Lord Eldon continued his observation by saying, "And so it has been considered ever since. It is too late now to contend against the validity of a clause in restraint of anticipation."

The result is, then, that a restraint against alienation of a married woman's separate estate will receive effect in equity, if there be words clearly expressing such a restraint; but this will not be inferred from the use of words, which had plainly no other object than to create the separate estate. And *Field v. Evans*⁽ⁱ⁾ may be given as an instance of what is sufficient to express the restraint; there property was settled upon trust to take the rents, &c., *"when and as often as the same shall become due,"* and to pay them to a married woman, or to such person as she should from time to time direct, for her separate use, and so as her receipt, or the receipt of any person to whom she might appoint the income, *"after the same*

(a) 3 Bro. C. C. 568.

(c) 11 Ves. 222.

(e) 1 S. & S. 429.

(f) See *Parkes v. White*, 11 Ves. 221.

(h) 4 Bro. C. C. 486.

(b) Id. 346.

(d) 12 Ves. 501.

(g) 2 Mer. 487.

(i) 15 Sim. 375.

should become due," should be a valid discharge. Sir L. Shadwell, V. C., decided that the woman was restrained from anticipating her income. The reasoning by which this contradiction to the acknowledged rule of the common law, that a power to alienate is an inseparable incident of property, was introduced, was, that the interest of a feme coverte, to the extent to which the settlement constitutes her a feme sole, was a mere creature of equity; and, therefore, a court of equity might modify the estate of its own creation, by allowing a clause in *restraint of alienation; (k) or, in [507] other words, having assumed the power to create a particular estate, equity assumed the further power of modifying this estate of its own creation, so as to make it effectual for the purpose for which it was devised.

In *Barrymore v. Ellis*, (l) where trustees were to pay an annuity, as the wife should appoint after a prescribed form, "but so as not to deprive herself of the benefit thereof by sale or other anticipation; and, for want of such direction or appointment," to pay to the wife, "for her own sole, separate, and peculiar use and benefit"—Sir L. Shadwell, V. C., gave effect to an assignment of the annuity made by the wife in security for money borrowed, upon the ground, that, under this clause, the wife had a power to appoint in the limited manner pointed out, and likewise a general uncontrolled dominion, in case she did not choose to execute the power. The same judge repeated this opinion in *Brown v. Bamford*, (m) where the terms used were in substance the same as those in *Barrymore v. Ellis*. But his Honor's decision was disregarded by Sir J. K. Bruce, V. C., in *Moore v. Moore*; (n) by Sir J. Wigram, V. C., in *Harrop v. Howard*; (o) and by Lord Langdale, M. R., in *Harnett v. McDougall*; (p) and, finally, it was reversed by Lord Lyndhurst, C., in an appeal of *Brown v. Bamford*, (q) when his Lordship, without controverting the general principle upon which *Barrymore v. Ellis* had been decided—that where a limited power of appointment is created, and, in default of the execution of such power, the estate is given generally to the same person, it is competent to the donee to dispose [508] of the estate without *regard to the power—ruled that that principle had no application to the case under consideration, for the manifest intention was, that the restraint should apply to the whole gift.

While equity has invented the separate estate, and the modification of that estate so that it may be enjoyed without a power of alienation, both inventions opposed to the common law, it has not disturbed the common law further than was necessary for the object it had in view by these inventions viz. enabling a married woman to enjoy estate separate from, and independently of, her husband. If, therefore, a gift of property be made to the separate use of a woman, when she is actually married, the clause in restraint of alienation will operate only during that coverture; and so soon as the husband dies, the woman will acquire all the rights of a feme sole and of an absolute owner, that of alienation included. (r)

If property be given to the separate use of a woman, who is not married

(k) See *Jackson v. Hobhouse*, 2 Mer. 487.

(m) 11 Sim. 127.

(n) 1 Coll. 54.

(l) 8 Sim. 1.

(o) 3 Hare, 624.

(p) 8 Beav. 187.

(q) 1 Ph. 620. See also *Medley v. Horton*, 14 Sim. 222.

(r) *Jones v. Salter*, 2 Russ. & My. 208; *Barton v. Briscoe*, Jac. 603; *Knight v. Knight*, 6 Sim. 121; *Benson v. Benson*, 6 Sim. 126; *Bradley v. Hughes*, 8 Sim. 149.

at the date of the gift, with a clause in restraint of alienation, directed against any coverture she may enter into, she will have all the rights of a feme sole and absolute owner while she continues sole; and upon her application the property will be transferred to her for her absolute use.^(s) It was at one time supposed, that, in the case last stated, the clause in restraint of alienation would be inoperative upon the woman entering into coverture, unless there were a gift over in case of its breach,^(t) because, being at the time a feme sole, the property vested in her, with all the rights with which it would have vested in a male, against whom such a clause would be inoperative without a gift over.^(u) In *Massey v. Parker*,^(v) Sir C. Pepys, * [509] M. R., expressed an opinion, not only in consonance with this supposition, but to the effect that the property would, by the act of marriage, be given to the husband. Yet, singularly enough, in *Davies v. Thorneycroft*,^(w) Sir L. Shadwell, V. C., while he did not question his own judgment in *Newton v. Reid*, determined that a gift to the separate use, not fenced by a clause in restraint of alienation, should be operative upon a subsequent coverture. In short, the notion seems to have been, that the anomaly of giving property to a woman, to be enjoyed separately from her husband, might have existence, although the woman were not married at the time of the gift; but that, in order to the existence of the still further anomaly that she should not be able to dispose of such property, it was necessary that she should actually be married at the date of the gift.

At length, the case of *Tullett v. Armstrong*^(x) presented itself for judgment. There a testator devised property to his widow for her life, and after her death to his granddaughter, who was then a feme sole, for her life, for her separate use, with a clause in restraint of alienation. While the devise had not as yet vested in possession by the death of the widow, the granddaughter married, and afterwards joined with her husband in assigning her life-interest, in security of a debt owing from her husband. Subsequently the husband took the benefit of the Insolvent Act, and the private assignee thereupon filed his bill, in order to obtain payment of his debt out of the wife's life-estate. Lord Langdale, after delivering a very elaborate judgment, in which he reviewed all the cases that have been mentioned, declared that the creditor had not acquired any right under his securities. In *Nedby v. Nedby*,^(y) Lord Cottenham *expressed great doubts of the soundness of the decision in *Newton v. Reid*, and of the opinion he had himself [*510] expressed in *Massey v. Parker*, and soon afterwards the case of *Tullett v. Armstrong* was brought before him by appeal. His Lordship, after a very full argument of the case, affirmed the decision of Lord Langdale, observing, that, if the case be of a separate estate without power of anticipation, it must exist with that qualification or fetter, if it exist at all; and there was no principle upon which it could be held, that the separate estate operated during a coverture subsequent to the gift, but that the provision against anticipation, with which the gift was qualified did not. "The separate estate and the prohibition of anticipation are equally creatures of equity, and

(s) *Barton v. Briscoe*, ubi supra; *Woodmeston v. Walker*, 2 Russ. & My. 204; *Brown v. Pocock*, Id. 210.

(t) *Newton v. Reid*, 4 Sim. 141; *Malcolm v. O'Callaghan*, 5 L. J., N. S., 137.

(u) *Brandon v. Robinson*, 18 Ves. 429.

(v) 2 My. & K. 182.

(w) 6 Sim. 420.

(x) 1 Beav. 1.

(y) 4 My. & Cr. 367.

equally inconsistent with the ordinary rules of property; the one is only a qualification or restriction of the other. When this Court first established the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a feme sole, the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered; and, by another violation of the laws of property, supported the validity of the prohibition against alienation. In the case now under consideration, if the after-taken husband be permitted to interfere with the property given or settled before the marriage to the separate use of the wife, much of the benefit and security of the rules which have been so established will be lost. Why, then, should not equity in this case also interfere; and, if it cannot protect the wife consistently with the ordinary rules of property, extend its own rules with respect to the separate estate, so as to secure to her the enjoyment of that estate which *has been so invented for her benefit? It is, no doubt, [*511] doing violence to the rules of property to say that property, which, being given with qualifications and restrictions which are held to be void, belonged absolutely to the woman up to the moment of her marriage, shall not be subject to the ordinary rules of law as to the interest which the husband is to take in it, (and that is the sense, and the only sense, in which the expression used in *Massey v. Parker*, 'why may she not, by the act of marriage, give it to her husband?' is to be understood;) but it is not a stronger act to prevent the husband from interfering with such property than it was originally to establish the separate estate, or to maintain the prohibition against alienation."

Upon a review of all the cases, they appear to establish these propositions—that a clause of separate estate, whether alone or coupled with a clause against anticipation, will operate only during the actual existence of coverture; that, if the two clauses exist, no circumstances will disjoin them, but they will both operate according to their terms; that, if they be directed against a particular coverture, existing at the date of the gift, their operation will cease when that coverture terminates; that, if they be directed against a particular coverture, contemplated only at the date of the gift, but which has not occurred at the date of the gift coming into possession, they will be inoperative until the coverture occurs, and after it occurs their operation will cease when the coverture terminates; that, if they be directed against coverture generally, without reference to any coverture in particular, they will be inoperative until coverture occurs, and their operation will terminate with the coverture, unless their terms are sufficiently broad to embrace successive covertures, in which case their operation will recommence and terminate with each successive coverture; that, in order to preserve their efficacy on the occurrence of coverture, subsequent to a period of dis- [*512] coverture, *it will not be necessary that a clause against anticipation should be fenced by a gift over in case of its breach; and, finally, that the only method of preventing the donee from exercising the right of disposition during a period of discoverture, so as to defeat the restraint against anticipation, on the occurrence of subsequent coverture, is to direct

the restraint against a period of discoverture, and to fence it by a gift over in case of breach.

In *Baggett v. Meux*,^(z) the question was raised whether the clause in restraint of alienation could be imposed as a qualification of a married woman's enjoyment of real property, when annexed to a legal devise in fee, upon the ground that the enjoyment of lands could not, according to the common law, be controlled by the terms of the gift. But Lord Cottenham, C., observed, that the reasoning, upon which the efficacy of the restraint in the enjoyment of personal property had been supported, applied evidently to a fee as much as to a life-estate, and to real property as much as to personal; the courts of equity, having in both created a new species of estate, might in both cases modify the incidents of that estate.

In *Dixon v. Dixon*^(a) property was settled to the separate use of a woman then on the eve of marriage, with a clause against anticipation, directed against the intended husband or any future husband, with a limitation of the corpus of the fund to the wife, in case there should not be issue of the marriage, and she survived the intended husband. The first husband died, and the wife married a second. It was then argued for the second husband, that the estate for life and the absolute estate in the corpus coalesced on the death of the first husband, and the clause against anticipation thenceforth ceased to be operative: but the argument was disregarded by Lord Langdale, M. R.

*CHAPTER VII.

[*513]

LIABILITY OF SEPARATE PROPERTY OF THE MARRIED WOMAN FOR PAYMENT OF HER DEBTS.

At law, as the rule was restored by *Marshall v. Rutton*,^(aa) a married woman, except in special cases, cannot contract as a feme sole; neither can she, as such, except in special cases, sue or be sued; and, as a consequence of this, she cannot make any contracts which will affect her separate estate. At law, therefore, neither the *general* nor the particular creditors of a married woman have any relief against her or her separate estate. At the same time, if she allow herself to be sued or be taken in execution as a feme sole, without disclosing her coverture, the Court will not at once discharge her from custody, but will leave her to her remedy by writ of error. It is otherwise, however, in equity; for as it created the separate estate, so it has given to it those attributes of all property—a power in the owner to deal with or dispose of it, and a liability of the property to make good such debts as the owner may have contracted. In short, equity, in every respect, treats property given to a married woman for her separate use, without restraint as to alienation, as the property of a feme sole. The principles upon which this result has been arrived at have neither been uniform nor consistent;

^(z) 1 Ph. 627.^(a) 2 Jur. 960.^(aa) 8 T. R. 547.

and, therefore, it will be necessary to notice shortly the history of the law upon this subject.

It has, from an early time, been recognised as sound law, that a married woman, possessed of estate to her *separate use, without any restraint [*514] as to alienation, may dispose of it by any instrument purporting, or intending so to do, whether by will or by an instrument to take effect inter vivos. (b) But the Courts did not see their way to subjecting the estate to liabilities, neither expressly referring to it, nor apparently intended to have such reference. To subject the separate estate of a married woman to general liabilities seemed to be stripping her of her character as a *feme covert*, by recognising a general power to contract liabilities, and to be running too strongly counter to the rule of disability at common law. It is true, that the earlier cases do not shew any hesitation upon this subject. Thus, in *Norton v. Turville*, (c) Sir J. Jekyl, M. R., while he allowed a bond granted by a married woman having separate estate to be simply void, said the separate estate was a trust for payment of debts, and decreed payment of the bond out of it. Again, in *Peacock v. Monk*, (d) Lord Hardwicke said, that if a wife, having estate to her separate use, borrowed money, and gave a bond for its payment, "this would give a foundation to demand the money against her out of her separate estate." And in *Hulme v. Tenant*, (e) Lord Thurlow, while he acknowledged the inability of a *feme covert* to contract, so as to raise a *personal* liability against herself, laid it down that her trustees would be obliged to apply her personal estate, and the rents of her real estate, to the satisfaction of her general engagements; and in *Lilia v. Airey*, (f) Lord Thurlow expressed his opinion, that a general creditor had a right against the separate estate of a married woman.

But, at a later period, the difficulty of subjecting the separate estate of a married woman to general liabilities seems to have struck the Court, and to have suggested the necessity of accomplishing the liability through a fiction, [*515] *which should not conflict with the rule at law as to the inability of a married woman to contract debt. Accordingly, in *Bolton v. Williams*, (g) where these cases were cited, Lord Loughborough said, the security given by the wife was, in them, treated as operating as an *appointment* of her separate property. In *Jones v. Harris*, (h) Lord Eldon considered the security as intended to create a *charge* upon the separate estate. In both of these cases, purchasers from a married woman, of annuities charged upon her separate estate, which were declared to be void under the Annuity Acts, insisted upon a right to recover the price of the annuities out of the separate estate. But this was refused, because the annuity deed, being void under the statutes, could not create any lien or charge; the claim, therefore, resolved into a personal demand. In *Aguilar v. Aguilar*, (i) Sir J. Leach, V. C., came to the same conclusion upon the same circumstances. In *Heatley v. Thomas*, (k) Sir W. Grant decreed payment of a bond by a married woman out of her separate estate; and in *Bullpin v. Clarke*, (l) the same judge made

(b) *Hulme v. Tenant*, 1 Bro. C. C. 20; *Fittplace v. Georges*, 3 Id. 9; *Rich v. Cockell*, 9 Ves. 375.

(c) 2 P. Wms. 145.

(e) 1 Bro. C. C. 20.

(g) 2 Ves. jun. 138.

(i) 5 Madd. 414.

(l) 17 Ves. 365.

(d) 2 Ves. sen. 193.

(f) 1 Ves. jun. 277.

(h) 9 Id. 486.

(k) 15 Ves. 598.

a like decree for payment of a promissory note granted by a married woman, in security of money borrowed under a verbal promise that it should be paid out of her separate estate.

In *Greatley v. Noble*,^(m) Sir J. Leach said, that, when a wife joined with her husband in granting a security, it was implied to be an execution of her power to charge her separate property, and that it would be difficult to find either principle or authority for reaching the separate estate of a *feme covert*, without any charge on her part, either express or to be implied. And in that case and a subsequent one, *Stuart v. Kirkwall*,⁽ⁿ⁾ his Honor refused to establish against the *separate estate, in the one case, [516] a general liability, and, in the other, liability upon a promissory note granted by a married woman, without any reference to her separate estate, verbal or otherwise.

If the married woman either expressly execute a power of appointment in regard to, or make an express charge upon, her separate estate, no doubt, of course, could exist as to the effect of the instrument upon the property, and the mode in which it should operate. But these later cases established, that where a married woman did not expressly do either of the acts which have been suggested, but merely executed an instrument, as a bond, promissory note, or bill, it was to be intended that she designed thereby to make a charge upon her separate estate; because those instruments, being made by a *feme covert*, would otherwise be nugatory, and have no operation. Adopting this as the state of the law upon the subject, and with apparent approbation, Lord Brougham, in *Murray v. Barlee*,^(o) sustained a written promise by a married woman to pay the bills of solicitors employed by her and her husband, as effectual to constitute a charge payable out of her separate estate, and intimated an opinion, that even a verbal retainer would have been sufficient for the purpose.^(p) In *Owens v. Dickenson*,^(q) Lord Cottenham seemed to coincide in this opinion. "It certainly seems strange," said his Lordship, "that there should be any difference between a contract in writing, when no statute requires it to be in writing, and a verbal promise to pay. It is an artificial distinction not recognised in any other case." In a previous case,^(r) Sir W. Grant had determined that simple contract creditors of a married woman were to be paid out of her separate estate *pari passu* with her specialty creditors.

Wainwright v. Hardisty^(s)—a case which occurred shortly *previous, but does not appear to have been referred to in *Owens v. Dickenson*, to be presently noticed—is a further instance of the extent to which the Courts have subjected the separate estate of a married woman where she has not expressly bound that estate, but executed an instrument which could have effect no other way than out of it. There the married woman, without any imputation of fraud, had joined with her husband in executing a mortgage, upon the notion that she had the fee-simple absolute of the lands by means of a power of revocation and new appointment, whereas she had only a life estate for her separate use; and Lord Langdale, M. R., decreed the mortgage to have effect upon such estate as was really

(m) 3 Madd. 94.

(n) Id. 387; see also *Field v. Sowle*, 4 Russ. 112.

(o) 3 My. & K. 209.

(p) But see, *contra*, *Callow v. Howle*, 17 L. J., N. S., 71.

(q) Cr. & Ph. 55.

(r) Anon., 18 Ves. 258.

(s) 2 Beav. 363.

in the wife; "for, except in that way, it could have no operation." *Tullett v. Armstrong*(t) should be mentioned here as an exact counterpart to *Wainwright v. Hardisty*; there the married woman, being entitled to leasehold and copyhold estates to her separate use, joined with her husband in executing an annuity deed, whereby the husband alone granted the annuity, assigned the leaseholds, and covenanted that he and his wife would surrender the copyholds to Cox, who, it was agreed "between the parties," should hold them upon trust to secure payment of the annuity. Lord Langdale refused to sustain the deed as a charge upon the separate estate of the wife, as it did not shew, on her part, any intention to bind it, but had in contemplation merely the right and interest of her husband in her right.

The liability of the separate estate for the general as well as the particular debts of the wife has thus been admitted by every judge. The only difference has been as to the principle upon which the liability was to rest; and the liability has been enforced in every case where this could be done without violence to the principle adopted for the *time. In *Owens* [518] *v. Dickenson*,(u) Lord Cottenham restored the doctrine of the liability to the basis upon which it had been rested by Sir J. Jekyl and Lords Hardwicke and Thurlow, and pointed out the inconsistencies of viewing the liability imposed by a married woman, in whatever mode this might be done, either as the execution of a power, or the creation of a charge. His Lordship said, "That document" (an agreement by a married woman, to repay a sum of money in a certain event, signed by her mark) "alone, within the authority of the cases which have been decided, would have been operative upon her separate estate, but not by the way of the execution of a power; although that has been an expression sometimes used, and, as I apprehend, very inaccurately used, in cases where the Court has enforced the contracts of married women against their separate estate. It cannot be an execution of the power, because it neither refers to the power, nor to the subject-matter of the power; nor, indeed, in many of the cases, has there been any power existing at all. Besides, as it was argued in the case of *Murray v. Barlee*, if a married woman enters into several agreements of this sort, and all the parties come to have satisfaction out of her separate estate, they are paid *pari passu*; whereas, if the instruments took effect as appointments under a power, they would rank according to the priorities of their dates. It is quite clear, therefore, that there is nothing in such a transaction which has any resemblance to the execution of a power. What it is, it is not easy to define. It has sometimes been treated as a disposing of the particular estate; but the contract is silent as to the separate estate; for a promissory note is merely a contract to pay, not saying out of what it is to be paid, or by what means it is to be paid; and it is not correct, according to legal principle, to say that a contract to pay is *to be construed into a contract to pay out of a particular property, so as to constitute a lien on that property. Equity lays hold of the separate property, but not by virtue of anything expressed in the contract; and it is not very consistent with correct principles to add to the contract that which the party has not thought fit to introduce into it. The view taken of the matter by Lord Thurlow, in *Hulme v. Tenant*, is more correct. According to that

(t) 4 Beav. 319.

(u) Cr. & Ph. 48.

view, the separate property of a married woman being a creature of equity, it follows, that, if she has a power to deal with it, she has the other power incident to property in general, namely, the power of contracting debts to be paid out of it; and, inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied."

These observations seem to rest the liability of the separate estate of a married woman for her debts upon reason and common sense, without the aid of any legal fiction or implication—aids which cannot be of universal application; while, at the same time, the recognition of them as the basis of the liability is productive of injustice, where the application is impossible; as was the case in *Bolton v. Williams*, *Jones v. Harris*, and *Aguilar v. Aguilar*, where the fiction of an intention to create a charge for payment of the price given for an annuity was repudiated because of the real charge, (by way of the annuity itself), which the party had in fact created, although its efficacy was defeated by the Annuity Acts: so that, by the operation of this supposed fiction, the creditor was deprived both of his annuity and of the price he had paid for it. Such a result is not likely again to happen; for now it may be taken as the law, that property given to a woman for her separate use, without restraint as to anticipation, will be fastened upon in equity to make good her liabilities contracted during coverture, [*520] howsoever the liability may have been constituted.(v)

And yet it must not be supposed that the separate estate of the wife can be made liable without any promise or understanding on her part to pay, either written or verbal. This was attempted in *Callow v. Howle*,(w) where a solicitor filed a bill to have costs, for business done in regard to the separate estate of a married woman, made a charge upon that estate merely because of the relation of the costs to the estate, and of an implied contract to pay arising out of this circumstance; but this argument was disregarded by Sir J. Knight Bruce, V. C., after having had *Owens v. Dickenson*, and the other cases which have been mentioned, brought to his notice.

It may be noticed here, as having some relation to the matter which has just been handled, that if a married woman have estate given to her separate use absolutely, should the husband have maintained her in a way that shewed he had been able to do so by the fact of no debts in respect of her maintenance being left unpaid, the past maintenance will not be made a charge in favour of the husband upon her separate estate.(x)

While as yet the extent of a married woman's power over estate settled to her separate use had not been clearly ascertained, it was thought that, where the estate was vested in trustees, any act done by them to accomplish or perfect her disposition was a breach of trust, where that disposition was not in favour of a third party bona fide contracting with her, but in favour of her husband, against whom, it was said, the trust was contrived for her protection. Accordingly, in *Whistler v. Newman*,(y) trustees were decreed,

(v) See also *Stead v. Neilson*, 2 Beav. 245; and *Major v. Lansley*, 2 Russ. & My. 355.

(w) 11 Jur. 985.

(x) *Edwards v. Abrey*, 2 Ph. 37.

(y) 4 Ves. 129.

[*521] by Lord Rosslyn, to make good the dividends* of stock settled to the separate use of a married woman, which had been sold by them with her privy, and paid over to the husband; and in *Mores v. Huish*,^(z) the same judge refused to order trustees to pay the dividends of stock, settled in a similar way, to the purchaser of an annuity from the married woman and her husband, although in neither of these cases were the circumstances such, that, if the cestui que trust had not been a married woman, the decree made by the Court could have been justified upon its ordinary principles. But the authority of both cases was overruled in *Wagstaff v. Smith*,^(a) where Sir W. Grant, upon the authority of the cases establishing that a married woman was to be considered as a feme sole in regard to property settled to her separate estate, over which she had a complete absolute interest, decreed the trustees of stock settled in this manner to pay the dividends to the purchaser of an annuity from the husband, pursuant to a security for its due payment given by the married woman, because there was nothing in the transaction which could have entitled the married woman to have it set aside, if she had filed a bill for that purpose; and in *Essex v. Atkins*^(b) a similar decree was made by the same judge. It may now, therefore, be considered as established, that, where property settled to the separate use of a married woman, with an absolute power of disposal in her, is vested in trustees, their assent or dissent to her disposal of it, even in favour of her husband,^d is quite immaterial, and will not expose them to or protect them from liability, further than it would do in the case of any other cestui que trust, upon the ordinary principles which regulate liabilities between trustee and cestui que trust.

As a married woman is in equity considered a feme sole in regard to property held by her to her separate use, it follows, as a necessary consequence, [*522] that her relief against *dispositions of that estate must depend upon the same rules and principles that would entitle a feme sole to relief. If the disposition has been her own deliberate act, not obtained from her either by fraud, surprise, or undue influence, (the ordinary influence of a husband not coming within that term), she will not be entitled, because of her coverture, to any relief against such her own act;^(c) and even in cases in which she would, like any other individual, be entitled to relief against her own act, her continued acquiescence in the act, after a lapse of considerable time, will bar her title to such relief.^(d)

Although a married woman, having estate to her separate use, is, in regard to such estate, treated as a feme sole, her contracts in relation to such estate are not effectual to create any personal obligation upon her; for courts of equity, in enforcing such contracts, act, not in personam of her, but upon the property itself.^(e) At law, as already observed, a married woman can neither sue nor be sued without her husband being joined with her;^(f) but in equity she may maintain a suit as sole plaintiff in respect of her

(z) 5 Ves. 692.

(a) 9 Id. 520.

(b) 14 Id. 547.

(c) *Grigby v. Cox*, 1 Ves. sen. 517; *Masters v. Fuller*, 4 Bro. C. C. 19; *Essex v. Atkins*, 14 Ves. 542.

(d) *Pawlet v. Delaval*, 2 Ves. sen. 663.

(e) *Hulme v. Tenant*, 1 Bro. C. C. 21; *Aylett v. Ashton*, 1 My. & Cr. 111.

(f) *Marshall v. Rutton*, 8 T. R. 547.

separate estate ;(g) but in such case, on the supposition that the husband has a conflicting interest, and, therefore, is not joined as plaintiff, she must sue by a next friend, her husband being a defendant. Where the suit is against a married woman, in respect of her separate estate, she is not a mere formal party, but must be served personally with process;(h) she must put in her answer ; and, if she fail, she will be liable to an attachment to compel it.(i)

*BOOK V.

[*523]

AGREEMENTS FOR SEPARATION OF HUSBAND AND WIFE.

CHAPTER I.

OF THE NATURE OF THE AGREEMENT BY WHICH SEPARATION OF HUSBAND AND WIFE CAN BE ACCOMPLISHED, AND HOW AND TO WHAT EXTENT IT WILL BE ENFORCED.

By the law of England, as it is now administered, marriage legally effected is an indissoluble tie which legislative enactment can alone undo, although that is a mode of relief attainable only by those possessed of means to defray the very heavy expense with which such a proceeding is attended. While the law has thus refused any assistance to dissolve the connexion of husband and wife, however righteously it may be demanded, it has not, at the same time, compelled the parties to live and cohabit together as married persons, which, logically speaking, perhaps it ought to have done. But those by whom the law has been moulded from time to time seem to have felt, that to refuse to dissolve an adulterous connexion, and at the same time compel the injured party to cohabit, was a severity of system which no civilised community would long endure. Accordingly, agreements for married persons to live apart have been recognised in courts of law, in instances too numerous to leave it at all doubtful that such agreements are, to some *effect, when framed in the way to be presently noticed, legally [*524]

(g) Griffith v. Hood, 2 Ves. sen. 452.

(h) Jones v. Harris, 9 Ves. 488.

(i) Bell v. Hyde, Fre. in Ch. 328; Dubois v. Hole, 2 Vern. 614; Pannell v. Taylor, Turn. & Russ. 96.

valid, however anomalous and occasionally even perplexing, may be the questions to which they give rise in regard to the character of the acts and obligations of the wife during the separation, whether as those of a *feme covert* or a *feme sole*.

As the husband and wife are in law but one person, it is impossible for them to contract with each other. An agreement, therefore, between themselves alone to live separate would be void upon this ground, that they were incapable of contracting with each other to any effect.(a) But, even if this were otherwise, such an agreement would be objectionable on another ground, that it is a contravention of the general policy of the law in regard to the relations of domestic life, which the public has an interest in preserving, that persons, without dissolving the bond of marriage, should at their own hand place themselves, in some respects, in the condition of being single. Accordingly, if an agreement be made between husband and wife *alone*, for living separate from each other, performance of such an agreement will not be specifically enforced, to the effect of compelling the parties to live separate; for the courts of equity do not recognise in husband and wife a power to vary the rights and duties growing out of the marriage contract, or to effect, at their pleasure, a partial dissolution of the contract;(b) and, so far as the validity of such an agreement, or the right to have it enforced, might depend on any acts justifying a separation, the courts of law and equity would decline to entertain jurisdiction to make the inquiry, which is properly the function of the ecclesiastical courts.(c) If the agreement were to contain a covenant not to sue for *restitution of conjugal rights, the covenant would not, in the ecclesiastical courts, be treated as forming any impediment to such a suit;(d) neither, so far as appears, would the Courts of law by prohibition, or the Courts of equity by injunction, restrain the prosecution of such a suit.(e) So far, the administration of the law is consistent with principle, and with its recognised policy. But the Courts do give effect so far, even to such agreements, as to consider them a formal renunciation by the husband of his common-law right to compel the wife to live with him; and, therefore, if the husband, in breach of the agreement, should attempt to enforce this right by seizing the wife's person, the Courts, upon *habeas corpus*, will set her at liberty, leaving him to his remedy for enforcement of his conjugal rights in the proper jurisdiction.(f)

But while it is unquestionable, upon the authority of the cases that have been cited, and of the dicta of eminent judges in other cases, that a covenant between husband and wife to live separate from each other will not be enforced either at law or in equity, it is equally certain that collateral or accessory covenants, in a contract founded upon the motive of living separate, will receive effect both at law and in equity, where a third party is

(a) *St. John v. St. John*, 11 Ves. 531.

(b) *Wilkes v. Wilkes*, 2 Dick. 791; *Worrall v. Jacob*, 3 Mer. 268.

(c) *Mildmay v. Mildmay*, 1 Vern. 53; *Hinckes v. Nelthrope*, Id. 204; *Legard v. Johnson*, 3 Ves. 361.

(d) *Mortimer v. Mortimer*, 2 Hagg. 318, Con. Ca.; *Sullivan v. Sullivan*, 2 Add. 299.

(e) *Fletcher v. Fletcher*, 2 Cox, 107; *Marshall v. Rutton*, 8 T. R. 546; *Westmeath v. Westmeath*, 1 Dow & C. 519.

(f) *Lister's case*, 8 Mod. 22; *Mead's case*, 1 Burr. 585.

introduced into the contract, competent to contract with the husband, and as to whom there is a consideration to support the instrument, although it originate out of, and have relation to, that unauthorised state of separation in which the husband and wife have endeavoured to place themselves; and, as will be presently shewn, even if no third party be introduced, and the covenants by the husband are voluntary on his *part, effect will be given to them where the interests of his creditors do not intervene. If, [*526] therefore, a trustee for the wife covenant with the husband to indemnify him against the debts of the wife, and the husband, on the other hand, covenant with the trustee to pay him an annuity for the maintenance of the wife, while they shall live separate, these covenants are between persons competent to contract with each other, and the indemnity given to the husband by the trustee's covenant would be a good and valuable consideration for the husband's covenant to pay the annuity,(g) which latter would therefore be specifically enforced in equity, although the necessary effect of this would be to enable the wife to continue living apart from her husband;(h) and, in *Wilson v. Wilson*,(i) a covenant by the wife in articles of separation, that, upon the execution by the husband of deeds carrying out the articles, proceedings of the wife in the ecclesiastical courts for a divorce, upon the ground of impotence, should be stayed, accompanied by a covenant for indemnity to the husband against his own debts, was held to be a sufficient consideration to support the articles.

It was formerly considered, that an agreement of the nature alluded to was effectual to support a suit for performance of the accessory covenants, not only where the separation of the married persons, which was the foundation of it, had already taken place, or was immediately to take place, but where the married persons were living together at the time, and it was made in contemplation of a future possible separation. Thus, in *Nicholls v. Danvers*,(k) effect was given to an agreement of this kind, by decreeing [*527] *the husband to pay the provision he had covenanted to make in case of a separation, although, so far as appears from the report of the case, the wife was herself to be judge of the necessity for the separation. And in *Rodney v. Chambers*(l) a similar decree was made, there being a proviso in the agreement that a separation should be with the approbation of the trustees for the wife. In *Chambers v. Caulfield*,(m) Lawrence, J., said, that *Rodney v. Chambers* "only decided that a covenant for separation and separate maintenance, with the consent of the trustees, was good; not that a covenant was good generally, that a wife might separate herself from her husband whenever she pleased, for that would be to make the husband tenant-at-will to the wife of his marital rights; but the Court saw nothing illegal in the parties agreeing to refer the question, what was a good cause of separation, to a domestic forum, instead of applying to the ecclesiastical court for a divorce in alimony."

These cases, however, are so far weakened by *Durant v. Titley*,(n) which

(g) *Stephens v. Olive*, 2 Bro. C. C. 92; *Compton v. Collinson*, Id. 386.

(h) *Seeling v. Crawley*, 2 Vern. 386; *Augier v. Augier*, Pre. in Ch. 496; *Elworthy v. Bird*, 2 S. & S. 372.

(i) 14 Sim. 405; affirmed on appeal, 1 C. & F., N. S., 538.

(k) 2 Vern. 671.

(l) 2 East, 283.

(m) 6 East, 252.

(n) 7 Price, 577.

was decided by a certificate to Chancery, without reasons assigned, and, so far as appears from the report, seems to have determined that the collateral covenants in an agreement for separation, where the separation had not already taken place, nor was to take place immediately, but was contemplated as possible at a future time, could not be supported. It must be observed, however, that, in *Durant v. Titley*, the separation, as in *Neville v. Danvers*, was to be in the discretion of the wife herself, whereas, in *Rodney v. Chambers*, it was to be with the approbation of the trustees—a circumstance which, as already shewn by the observations of Lawrence, J., in *Chambers v. Caulfield*, entered largely into the consideration of the Court in making its decision. *Durant v. Titley*, therefore, cannot *be [*528] considered as doing more than determining, that, where the future separation contemplated by the agreement is to take place at the discretion and pleasure of the wife, the agreement will not receive effect; and this is the view taken of the case by Abbott, C. J., and Bailey, J., in *Jee v. Thurlow*.(o) In so far as it does this, it is supported by *Hindley v. Westmeath*,(p) where a deed, bearing to be made in contemplation of a separation, to take place immediately, but which did not take place for some time afterwards, during which period the married persons cohabited together, was declared to be void. Where, therefore, the separation, though not immediately contemplated, is to take place, not at the pleasure of the wife, but by the approbation of third parties, selected by the husband and wife, as a domestic forum for adjustment of their differences, the agreement will, on the authority of *Rodney v. Chambers*, receive effect.

While the Court will thus give effect to the covenants by the husband in favour of the wife, it is not clear whether it will do so to the covenants by the wife in favour of the husband. The authorities upon this subject are conflicting. The preponderance, however, seems in favour of the affirmative; for, in *Freeman v. More*,(q) articles of agreement by a married woman, whereby she covenanted to settle upon her husband part of property which she held to her separate use for life, with a power to appoint the capital as a consideration for being allowed to continue a subsisting separation, were decreed to be performed. But, on the other hand, in *Durand v. Durand*,(r) in a suit by a married woman against the trustees of a fund settled to a separate use, instituted to compel the transfer by the trustees of £4550 out of £6050 to her husband, in fulfilment of an agreement, whereby [*529] she agreed to make this transfer on being allowed to live *separate from him, the Lord Chancellor, after conversing with the plaintiff, and having her desire for the decree repeated verbally, refused to make it, and dismissed her bill. Although it does not appear from the report, perhaps, the refusal of the Court to interfere arose from the circumstance of the separation being one that was to take place, and not pre-existing. Again, in *Logan v. Birkett*,(s) where a married woman, in an agreement for separation, charged property settled to her separate use with an annuity payable to her husband during his life, should they live so long separate,

(o) 2 B. & C. 547.

(p) 6 Id. 200; see also *Westmeath v. Westmeath*, 1 Dow. & C. 519, and *Cocksedge v. Cocksedge*, 14 Sim. 244.

(q) 1 Bro. P. C. 237.

(s) 1 My. & K. 220.

(r) 2 Cox, 207.

and in which he, on the other part, covenanted that he would permit her to enjoy to her separate use all the property to which she was or might become entitled, and that he would not molest her or do any act in derogation of her last will, Sir J. Leach said the question was, whether there was a consideration, other than the act of separation, to support the grant of the annuity; and he was of opinion, that the release by the husband of his marital right in the future acquired property of the wife was a good consideration from the husband. It would seem that Sir J. Leach did not consider that permission to live separate would alone have been sufficient consideration to support the covenant of the wife; and the same opinion may have been the ground of the judgment in *Durand v. Durand*; but in *Freeman v. More*,^(t) which was a decision of the House of Lords, there was no other consideration, and yet the covenant of the wife was given effect to.

If the property of the wife, which she gives to the husband by the agreement for separation, is not held by her as separate estate, the agreement, so far as it affects it, will be a nullity, by reason of the wife's incapacity to contract.^(u)

*Although, as has been seen, an agreement made in contemplation of a future possible separation will not receive effect, it is otherwise as to an agreement intended to prevent separation, and which for that purpose gives the wife pecuniary rights, which, in the ordinary intercourse of married life, where mutual confidence and esteem exist between husband and wife, she would enjoy, according to his discretion, and under his control if he should think proper to interfere, but which, by the agreement, are made precise and definite. Such an agreement will receive effect so long as it is not opposed to the policy of the law in regard to the control of the husband over his family as its legitimate head. Thus, in *Jodrell v. Jodrell*,^(v) an agreement entered into by husband and wife, with the view of stopping proceedings by the wife for a divorce, on the ground of cruelty—whereby the husband assigned a house to third parties upon trust to permit the wife to enjoy it for the accommodation of herself and her children, and demised to them lands upon trust to pay the wife £300 yearly for pin-money, and a further yearly sum of £3700 for her separate and absolute use, under a declaration, that out of the latter payment the wife should defray the expenses of the establishment in the house provided for her upon such a scale as she should think fit, such expenses as she should incur at watering-places, the taxes and repairs of the house, wages of servants, salaries of masters and governesses for her daughter, and clothing for one of her sons, and that, in case she should not require the whole £3700 for these purposes, the surplus should be paid over by the trustees to the husband—was sustained by Lord Langdale, M. R., as not creating any greater anomaly in the law, or inconvenience, than existed by the recognition of a power in the wife to enjoy *the estate separate from her husband, nor necessarily interfering with those duties which the law recognises as due from^[*531] the parties to each other, or depriving the husband of that control which he ought to have over his children.

(t) 1 Bro. P. C. 237.

(u) *Stamper v. Barker*, 5 Madd. 164.

(v) 9 Beav. 45.

*CHAPTER II.

OF THE CONSIDERATION NECESSARY TO SUPPORT THE COVENANT FOR SEPARATE MAINTENANCE.

A VALUABLE consideration for the covenant of the husband to give the wife separate maintenance is only necessary where the rights of the husband's creditors come into question; for, as already mentioned, where the interests of the creditors do not intervene, collateral covenants by the husband, in an agreement for separation, will receive effect, although the agreement be between the husband and wife alone, and the covenants be voluntary on his part, and the enforcement should be asked in a suit by the wife herself. (a) Lord Rosslyn, in *Leyard v. Johnson*, (b) and Lord Eldon, in *St. John v. St. John*, (c) expressed doubts of the propriety of the decision in *Guth v. Guth*; but in *Ros v. Willoughby*, (d) an objection of the absence of an indemnity to the husband, taken by demurrer to a suit for arrears of an annuity to the wife during separation, was overruled; and in *Clough v. Lambert*, (e) the objection of want of consideration, the agreement being [*532] *under seal, was disregarded by Sir L. Shadwell, V. C.; and in *Frampton v. Frampton*, (f) where the suit was by a wife to enforce a provision made for her by her husband, without any indemnity from her trustee against her debts or other consideration, Lord Langdale, after noticing the doubts expressed as to *Guth v. Guth*, observed, that *Fitzer v. Fitzer* had never been overruled, and no case had decided, that, without the intervention and covenant of a trustee, the husband might not voluntarily execute a deed or create a trust in favour of his wife, and that such deed or trust might not be binding as against him, even if the benefit of it should be dependent upon an existing or continuing separation, which was the principal, if not the only, inducement for the whole arrangement. As, therefore, in other cases, a voluntary trust by the husband in favour of the wife will be effectual against him, so will it be in this; and not the less so, that, by creating it, the husband has prevailed upon the wife to live apart from him, and waive the enforcement of her conjugal rights.

Although the voluntary covenants by the husband, in an agreement for separation, are thus good against him, yet if there be creditors of the husband at the time the covenants are sought to be enforced, and nothing in the past conduct of the husband towards the wife giving her a right to alimony, the rights of the creditors will prevail, under the 13 Eliz. c. 5, as they would in the case of any other voluntary gift. Thus, if the husband, in an agreement for separation, covenant to pay an allowance to the wife, this will be void against his creditors, although the wife, on the other part, should covenant to support herself and his children with the allowance; for the wife's covenant would not be a good consideration under the statute to support the husband's covenant, as she is incapable of contracting; and,

(a) *Fitzer v. Fitzer*, 2 Atk. 571; *Guth v. Guth*, 3 Bro. C. C. 617.

(b) 3 Ves. 361.

(c) 11 Ves. 571.

(d) 10 Price, 2.

(e) 10 Sim. 174.

(f) 4 Beav. 287.

*were it to be treated as a good consideration, it would only be necessary for the husband, in order to defraud his creditors, to put [*583] so much of his estate out of his power by vesting it in trustees for the separate use of his wife.(g)

But, if the conduct of the husband, by cruelty or otherwise, have been such as would entitle the wife to alimony, if she were to sue him in the Ecclesiastical Courts, this state of circumstances will take away the character of being either fraudulent or voluntary from his covenants in an agreement for separation, and will support them both against creditors to whom he may have been indebted at the date of the agreement, and against creditors with whom he may have contracted debt subsequent to that date; for, where the wife, instead of prosecuting her right, agrees to accept the maintenance proposed by the husband, his act in giving that maintenance cannot be said to be such a voluntary act as to be a fraud upon his creditors; neither can it be said that the wife, giving up her rights in the Ecclesiastical Courts, has not given up something, so as to make the covenants without consideration. The covenants of the husband, therefore, in such circumstances, are not such as the statute was meant to prevent, and will receive effect against his creditors.(h)

A fortiori, will the covenants of the husband be effectual against his creditors where the agreement is between him and third parties, from whom he has received a valuable consideration. For this purpose a covenant of indemnity against the debts of the wife will be sufficient consideration to produce this effect. Thus, in *Stephens v. Olive*,(i) the claim of the wife under a deed of separation, by which the husband conveyed his lands to trustees to pay her an annuity inter alia, and by which the trustees for her covenanted to *indemnify the husband against the debts of the wife, [*534] was decreed to be preferable to the claim of a creditor upon a bond granted prior to the deed of separation; and, in *Worrall v. Jacob*,(k) a covenant to indemnify the husband against the wife's debts, and any claim she might make for alimony, was determined to be a sufficiently valuable consideration to support the husband's covenant to convey lands to the uses of a deed of separation, against the assignees in bankruptcy of the husband claiming the lands under the 21 Jac. 1, c. 15; and, in *Elworthy v. Bird*,(l) the Vice-Chancellor said, that, where trustees agreed to indemnify the husband against the debts of the wife, that was a sufficient consideration for the allowance stipulated to be paid by the husband.(m)

The value of this indemnity as a consideration may be partially learnt by *Summers v. Ball*,(n) where, under a covenant against the debts which the wife had "then contracted, or which she should at any time or times thereafter during the continuance of the separation contract," it was held, that the trustees were bound to indemnify the husband against a debt contracted by the wife for necessities suitable to her degree in life, whilst living with the husband previous to the deed of separation.

(g) *Fitzer v. Fitzer*, 2 Atk. 513.

(h) *Hobbs v. Hull*, 1 Cox, 445; *Nunn & Ladbrooke v. Wilsmore*, 8 T. R. 521.

(i) 2 Bro. C. C. 90.

(k) 3 Mer. 256.

(l) 2 Sim. & St. 372.

(m) See also *Wilson v. Wilson*, 1 Cl. & F., N. S., 538, where the indemnity was against the husband's own debts.

(n) 8 M. & W. 596.

It has been already seen,(o) that the Courts will enforce against the husband those covenants in a deed of separation, between him and the wife alone, by which he makes a provision for her maintenance, although there may not be any consideration flowing from her. It is obvious, therefore, that, where trustees for the wife are parties to an agreement for separation, effect will be given to a covenant for maintenance, although there may not [*535] be any consideration *flowing from them for the covenant—such as an indemnity against the debts of the wife—for she, like any other cestui que trust, has a right to call upon the trustees to perform their trust.(p) Should the trustees arbitrarily destroy the instrument, the Court will set it up again;(q) or, if they refuse to enforce the trust against the husband, a suit for that purpose by the wife, by her next friend, will be sustained.(r) In *Archard v. Coulsting*,(s) the Court refused, on the motion of the executors of a surviving trustee, to stay proceedings brought by a married woman in their names to enforce against her husband performance of a covenant by him to pay her a separate maintenance, indemnity against costs of both plaintiffs and defendant having been given. And the same result followed upon a similar proceeding by the defendant in *Anster v. Holland*,(t) where it was admitted, on the motion of the defendant, that the trustee had refused to carry out the trusts of the deed.

If the husband have covenanted to pay the wife an annuity, the Court, in a suit to enforce the covenant, will not order the husband to pay into Court a capital sum sufficient to provide the annuity. This would be to alter the agreement between the parties, which was, that the husband might pay by degrees that which he had not means to pay at once. All that will be done, therefore, will be to order payment of the arrears, and the growing payments.(u)

If the wife had died between the terms for payment of the annuity, the current quarter was, prior to the Apportionment Act,(v) divided, according to the length of the period between the preceding quarter-day and the day of *the wife's death; and the portion corresponding to the period [*536] before the death was decreed to be paid to the wife's executors, where the bond for payment of the maintenance had been forfeited by non-payment.(w) This was done under the equitable interposition of the Court, in regulating how far the penalty of the bond should be enforced, and upon the same principle upon which the maintenance of infants is apportioned up to the day of their death; because it would be difficult for them to find credit, if the payment depended on their living to the end of the quarter. But now the Apportionment Act seems to regulate this as "a payment coming due at a fixed period," and to give by law that which formerly could only be obtained by equitable interference.

(o) Vide ante, p. 531.

(p) *Turner v. Boteler*, Ca. in Ch. temp. Finch, 73; *Augier v. Augier*, Pre. Ch. 496; *Head v. Head*, 3 Atk. 547.

(q) *Seagrave v. Seagrave*, 13 Ves. 443.

(s) 6 M. & G. 76.

(u) *Cooke v. Niggins*, ubi supra.

(w) *Howell v. Hanforth*, 2 Bl. 1016.

(r) *Cooke v. Niggins*, 10 Ves. 190.

(t) 10 Jur. 786.

(v) 4 & 5 Will. 4, c. 22.

CHAPTER III.

LIABILITY OF ALLOWANCE FOR SEPARATE MAINTENANCE OF WIFE FOR HER DEBTS AND OBLIGATIONS.

IF the allowance given by the husband to the wife, for her maintenance during separation, be so settled as to be to her separate use, independent of him, there does not seem to be any principle upon which her right over the fund can be said to be more limited than her right over a fund similarly settled while she is living with her husband, in regard to which, as has been seen, she is considered as a feme sole, having all powers of management and disposition, unless in so far as restrained in regard to anticipation by the terms of the settlement. But if the allowance is no other way given to the *separate use of the wife than in the sense that it is given for her maintenance, while living separate from her husband, her right is [*537] limited to enforcement of the trust for that purpose: she has no power to assign or charge the fund—further, at least, than is sanctioned by the terms of the instrument under which the provision is made.(a) But any savings which the wife may accumulate out of the provision will be her own absolute property, which she may either give away in her lifetime,(b) or dispose of by will.(c)

Whatever doubt there may formerly have been—and Roper(d) seems to think that there was a doubt, in his opinion an erroneous one—whether the provision settled upon trust for the maintenance of a married woman during separation from her husband, could be made liable to her debts without the manifestation of an intention by her to charge it with the particular debt, it does not appear there can be any question that such a manifestation is not necessary, now that it has been settled, as was shewn,(e) that property settled upon a wife living with her husband, to her separate use, is liable to her general engagements, provided always, the fund is held in trust for the wife's separate use.(f) But if the fund be merely held upon trust for the maintenance and support of the wife living apart from her husband, then it would seem to be necessary, upon the authority of *Hyde v. Price*,(g) that the debt should be of the nature for which the provision was made—i. e. for the maintenance and support of the wife—and that a debt contracted in any other way could not be enforced against the trust-fund. And with this agree the observations of Lord Cottenham in *Vandergucht v. De Blaquiere*,(h) *that the case of a married woman having right, by agreement, to an annual payment for her separate maintenance, and being sued for [*538] payment of a bill which she had granted for goods and money supplied to her, and had promised to pay out of her annual allowance, “did not differ from the many others which have occurred in which this Court has given to a creditor of a married woman, to whom she has given a bill for the debt, a remedy against the income settled to her separate use.”

(a) *Hyde v. Price*, 3 Ves. 437.(b) *Gage v. Lister*, 2 Bro. P. C. 4.(c) *Obiter* by Mansfield, C. J., in *Nurse v. Craig*, 2 B. & P. N. C. 159.

(d) Vol. 2, p. 305.

(e) *Vide ante*, pp. 511 et seq.(f) *Stuart v. Kirkwall*, 3 Madd. 387.(g) *Ubi supra*.

(h) 5 My. & Cr. 239.

Where the husband and wife are living separate, any presumed authority from the husband to purchase those things, which being for domestic use, might reasonably come within the scope of her agency, is at an end; and, for payment of articles so supplied, the creditor has no recourse against the husband. Thus, in *Reeve v. Conyngham*,⁽ⁱ⁾ where the wife of a nobleman, living at an hotel in London instead of the house of her husband, ordered articles of furniture to be sent to the house of third parties, the husband was held not to be liable, although he gave no evidence of knowledge by the creditor of an allowance paid by him to the wife.

If the husband, upon the separation of his wife from him, made a fixed allowance for her maintenance,^(k) suitable to his rank and fortune,^(l) considered with reference to the burdens, arising out of the marriage, which he has himself to bear, this will exonerate him from liability for her contracts for necessaries supplied to her, if the party making the furnishing had notice of the separation.^(m) And it will not be necessary to his exoneration, in such case, that the allowance has been fixed by deed or otherwise: it will be sufficient that the husband has, in fact, made it, though voluntarily, [*539] *and that it was reasonably sufficient,⁽ⁿ⁾ although the creditor may not, in fact, have known either of the allowance or its payment.^(o) Although the husband has agreed by deed to make the allowance, and covenanted to pay it, he will, nevertheless, be liable, unless he has also performed the covenant by actual payment;^(p) and action will lie against him, even at the instance of the trustee under the separation deed, to whom the allowance was covenanted to be paid, if he were the party who supplied the necessaries;^(q) for the law does not relieve a man from an obligation on the mere ground of an agreement to do something else, unless that agreement is performed.

Upon the same principle, an assignment of property to trustees, as a provision for the wife during separation, will not exempt the husband from action for necessaries supplied to her, if he is unable to shew that the trustees accepted the trust, assumed possession of the property, and paid the allowance.^(r)

Either express or presumed notice of the separation is necessary before the husband can be exonerated from liability for necessaries supplied on the order of the wife; for the public are entitled to assume, that, in the purchase of such articles, the wife has her husband's authority until they have notice of its withdrawal.^(s) What will amount to notice, must depend upon the facts of each case. Thus, where the husband visited the wife after separation, he was held liable for furnishings made to her by a party who was ignorant of any allowance having been made by the husband for her maintenance.^(t) But, if the fact of separation be notorious in the neighbourhood where the husband lives, that will be sufficient to put parties

(i) 2 C. & K. 444.

(k) *Thompson v. Hervey*, 4 Burr. 2177.

(l) *Hodgkinson v. Fletcher*, 4 Camp. 70.

(m) *Todd v. Stoakes*, 1 Salk. 116; 1 Raym. 444.

(n) *Holder v. Cope*, 2 C. & K. 437.

(o) *Reeve v. Conyngham*, 2 C. & K. 444.

(p) *Nurse v. Craig*, 2 B. & P. N. C. 148.

(q) *Id.*

(r) *Burrett v. Booty*, 8 Taunt. 343.

(s) *Hinton v. Hinton*, 3 Freem. 248.

(t) *Rawlyns v. Vandyke*, 3 Esq. 250.

*making furnishings to her upon inquiry, without the necessity of the husband proving actual notice.(u) And the same result would [*540] seem to follow where, from the nature of the wife's residence, as distinct from her husband's, the fact of separation was necessarily to be inferred by those dealing with her.(v)

CHAPTER IV.

OF THE POWER TO PUT AN END TO THE LIABILITY UNDER A COVENANT FOR SEPARATE MAINTENANCE BY DETERMINING THE SEPARATION.

WHERE there is a deliberate agreement between the husband and wife to live apart for ever, it is not in the power of the husband, at his pleasure, to put an end to this state of circumstances by requiring her to return to and live with him, or thereby to suspend or extinguish his covenant to make an allowance for her separate maintenance; for, notwithstanding he should do so, action would lie against him for performance of his covenant;(a) and a posterior covenant with him by the wife, that, so long as they should cohabit, he should be free from the provision, would not be an answer to such an action, whatever relief he might obtain by action upon the second covenant.(b)

If the separation is by the agreement contemplated to be *only [*541] temporary, and the provision is limited to the duration of such temporary separation, payment of the provision will not be enforced so long as the husband has not done anything which should make him forfeit his right and authority as such.(c) Should a third party have covenanted, for a valuable consideration received from the husband, to pay maintenance for the wife, then living apart from her husband, it will not be in the power of such a party to avoid his covenant by offering to take the wife into his own house,(d) and for very obvious reasons: the wife is under no obligation, legal or moral, to live with such a stranger, and her doing so would in no degree necessarily promote a reconciliation between her and her husband, which is one, at least, of the objects the law has in view in allowing the husband to put an end to his covenant to pay a separate maintenance, where the separation is only temporary.

The law will not permit a covenant to be binding to-day and inoperative to-morrow, at the will of the parties. Upon grounds of public policy, therefore, a reconciliation between husband and wife, followed by their living

(u) *Todd v. Stokes*, 1 Raym. 444; *Ozard v. Darnford*, 1 Selw. N. P. 294.

(v) *Reeve v. Conyngham*, 2 C. & K. 444.

(a) *Guth v. Guth*, 3 Bro. 617, and cases there cited; *Hoare v. Hoare*, 2 Ridg. P. C. 268.

(b) *Gowdon v. Draper*, 2 Vent. 217.

(c) *Head v. Head*, 3 Atk. 549.

(d) *Dutton v. Dutton*, 4 Vin. Abr. 178, pl. 8.

together, will put an end to an agreement between them for perpetual separation, which will not hold good whenever and as often as they choose to live separate.(e) But though this is the case, the parties may so frame the agreement as that the settlement upon the wife shall continue operative, although they should return to cohabitation; for this is not to produce any other effect than would follow if such a settlement had been made upon the wife without any view to separation.(f)

A suit for restitution of conjugal rights will not, however, be any answer [542] to an action upon the covenant for separate *maintenance;(g) neither will the plea of adultery be a good answer where the covenant is absolute, without any qualification in this respect;(h) neither will a decree by the Ecclesiastical Courts for divorce à mensâ et thoro upon the grounds of adultery.(i)

(e) *Bateman v. Ross*, 1 Dow, 245; *Fletcher v. Fletcher*, 2 Cox, 105; *St. John v. St. John*, 11 Ves. 537.

(f) *Wilson v. Mushett*, 3 B. & Ad. 743.

(g) *Jee v. Thurlow*, 2 B. & C. 552; *Baynon v. Bailey*, 8 Bing. 256.

(h) *Sidney v. Sidney*, 3 P. Wms. 276; *Jee v. Thurlow*, ubi supra; *Seagrave v. Seagrave*, 13 Ves. 443; but see *Scholey v. Goodman*, 1 Bing. 349.

(i) *Jee v. Thurlow*, ubi supra.

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